Vrije Universiteit Brussel

FACULTY OF LAW AND CRIMINOLOGY

CENTER FOR PRIVATE AND ECONOMIC LAW

THE IMPLICATIONS OF WTO RETALIATION TO PRIVATE ECONOMIC ACTORS: TO WHAT EXTENT STATE LIABILITY IS ACCOMPLISHED ?

Dissertation leading to the degree Doctor in de Rechten (Joint PhD in Law, Universiteit Gent and Vrije Universiteit Brussel)

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JULY 2014

UNIVERSITEIT GENT

VRIJE UNIVERSITEIT BRUSSEL · SCIENTIA VINCERE TENEBRAS ·

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JOINT PhD

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ACKNOWLEDGMENT

Conducting PhD is not a simple task to accomplish without support and supervise from all my supervisors. Therefore, I would like to express my gratitude to Prof. Dr. Kim Van der Borght (VUB), Prof. Dr. Koen Byttebier (VUB), Prof. Dr. Reinhard Steennot (UGENT) and Prof. Dr. Peter Van Elsuwege (UGENT) for all help, supervisory and support during my PhD Program.I also would like to thank to external jurries,Prof. Dr. Surya Subedi (University of Leeds, UK), and Prof. Dr. Mervyn Martin (Teesside Univerity, UK).

In addition, I would like express my gratidue to Faculty of Law and Criminology Vrije Universiteit Brussel, Faculty of Law Gent University, EU Erasmus Mundus Scholarship Program, Directorate General of High Education, Ministry of National Education Indonesia, Airlangga University Indonesia and all institutions who support my PhD program.

I also would like to thank to my family, my father Prof. Dr. Soeparna and my mother Sri Harsati, my brothers and my daughter, Amartya Latifa Airlangga.

Sincerely

Intan Soeparna

ABBREVIATION

AB	Appellate Body
ACP	Africa, Caribbean and Pacific Countries
AD	Anti-Dumping
AoA	Agreement on Agricultural
ARB	Arbitration
ASCM	Agreement of Subsidies and Countervailing Measures
ATC	Agreement on Textiles and Clothing
AoA-D	Agreement on Anti-Dumping
BECTU	Broadcasting, Entertainment, Cinematographic and Theatre Union
BFA	Bananas Framework Agreement
CERDS	Charter of Economic Rights and Duties of States
CFI	Court First Instance
CU	Custom Union
CSCM	Committee on Subsidies and Countervailing Measures
CRS	Congressional Research Service Report
DFAIT	Department of Foreign Affair and International Trade of Canada
DG	Directorate General
DS	Dispute Settlement
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Dispute
EC	European Community
ECHR	European Convention on Human Right
ECR	European Court Report
ECU	Ecuador
ECJ	European Court of Justice
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights

ECR	European Court Report
ECSC	The Coal and Steel Community
EEC	European Economic Community
ESCOR	Economic and Social Council Resolution
ETI	Extraterritorial Income Exclusion
EU	European Union
EURATOM	European Atomic Energy Community
FAO	Food and Agricultural Organization
FIAMM	FabbricaItalianaAccumulatoriMotocarriMontecchio Spa
FSC	Foreign Sales Corporation
GA	General Assembly
GATS	General Agreement of Trade in Services
GATT	General Agreement on Trade and Tariff
GAOR	General Assembly Official Records
GC	General Court
GDP	Gross Domestic Product
GNI	Gross National Income
GPT	General Preferential Tariff Treatment
HR	House of Representative
HTS	Harmonization Tariff System
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICTSD	International Centre for Trade and Sustainable Development
ILC	International Law Commission
IMF	International Monetary Fund
IPR	Intellectual Property Right
MFN	Most Favoured Nation Treatment
NGO	Non-Governmental Organization
NIEO	New International Economic Order
OECD	Organization for Economic Co-operation and Development

PCIJ	Permanent Court of Justice
PROEX	ProgramadeFinanciamentoàsExportaçaões
R	Report
RES	Resolution
SSINA	The Specialty Steel Industry of North America
SPS	Agreement on the Application Sanitary and Phytosanitary Measures
SOEs	State Owned Enterprises
TEC	Treaty of European Community
TFEU	Treaty on the Functioning of European Union
TRIPS	Agreement on Trade Related to Intellectual Property Rights
TRIMS	Agreement on Trade-Related Investment Measures
UDHR	Universal Declaration on Human Rights
URAA	Uruguay Round Agreement Act
U.S.A	United States of America
USTR	United States Trade Representatives
UK	United Kingdom
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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ABSTRACT

The WTO dispute settlement system recognizes trade retaliation under Article 22 (2) of DSU to induce scofflaw party of WTO dispute to comply with the DSB Decision. However, trade retaliation under the DSU rules lacks any duty to mitigate the economic or social consequences to private economic actors who conduct their economic activities under the WTO Agreements. Many of these actors will be innocent of any responsibility for the WTO violation that underlies the case. Banana case (EU v. US) and FSC/ETI case (US v. EU) were example of WTO cases from where these actors bear the cost of trade damage caused by the retaliation. Trade damage that is borne by these actors substantially infringed their rights to gain benefits under the WTO Agreement. They therefore seek the possibility to obtain compensation by recourse to national litigations. State liability principle may be viewed as a feasible principle to ensure these actors to obtain redress when their rights are infringed by the disobedience of their governments to WTO rules. Hence, the national judicial body is obliged to perform the function of state liability to rectify and to compensate the damage accruing to these actors. This research is pertinent to seek the answer to what extent is state liability accomplished when the private economic actors are badly affected by the WTO retaliation. However the lack of direct-effect to WTO Law and DSB Decision prevent these actors to obtain compensation for trade damage caused to them. To this end, this research also seek alternative solution to induce national litigation to determine a sole concern on infringement of individual right in order to imply state liability principle

GENERAL INTRODUCTION

1. Background

World Trade Organization (hereinafter the WTO) dispute settlement system through Panel and Appellate Body, allows sanctions to be imposed when a member is unwilling to bring a WTO-inconsistent trade measure into conformity. According to the Article 22 (2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter DSU), if in a certain case WTO Panel finds a party has failed to make new rules in compliance with the WTO obligations, the injured party is entitled to obtain retaliation. However, WTO retaliation is causing several implications specific to private economic actors against whom retaliation is instituted. Such economic actors are the main trade player under the WTO rules but have a vulnerable position in case of retaliation.

This research investigates the implications of WTO retaliation to private economic actors and to what extent state liability is relevant and accomplished. The question of state liability in this respect relates to the issue of compensation for damage caused to the private economic actors by the relation as a consequence of the decision not to comply with the dispute settlement ruling of the non-ability to comply with such ruling.

2. The Main Thrust of the Research

The principles and procedures are foreseen in the Article 22 (3) DSU underlines that the injured party who wins the dispute may suspend its concession in the same commercial sector, which is involved in the dispute. However, if it turns out to be impossible or ineffective, the country wishing to retaliate may seek from the Dispute Settlement Body (hereinafter DSB) authorization to suspend its concession in other industrial sectors covered by the same agreement. If this measure, still, is considered of little or no effect, the country will be able to request the suspension of its obligations covered by another agreement (cross retaliation).

According to Article 3 (7), 21 (6), and 22 (1) DSU, retaliation is only a temporary measure that falls short of resolving the dispute. The DSU clearly stipulates in Article 19 that the preferred remedy is for the non-compliant party to bring its measure into conformity with the relevant covered agreement. Hence, retaliation should be withdrawn once the non-compliant party brings its measure into conformity with WTO rules. From this point of view,

the retaliation serves to induce compliance[1] and should only be in place until such time.[2] Imposing retaliation can be immediately after DSB authorize the injured party to impose suspension concession or other obligation under covered agreement. An important procedural dispute arose in *the Banana Case* between the European Union (since the research is conducted after Lisbon Treaty, the research uses terms European Union (EU)unless it is inherently to the title of case and literatures) and the United Statesof America (hereinafter the U.S.) over the relative primacy and sequencing of compliance. The United States wished to retaliate immediately while the EU argued that this could only be done if its new trade measures for bananas were found not to comply with the WTO rules.[3]

Once injured party requests authorization from the DSB to suspend the application of concession or other obligations under covered agreement, or to impose retaliation, it must set out a specific level of suspension. The level of suspension must equivalent to the nullification and impairment that caused by the WTO inconsistent measure. In addition, the request must specify the sectors and the agreements under which concession or other obligations would be suspended.[4] Although the DSU does not explicitly require that members must include a list of potential target products with their request to impose retaliation, but in *EC-Hormones case*, the Arbitrators stated that, "the U.S. as the party that seek to suspend concession has to identify the products subject to suspension in a way that allowed us to attribute annual tariff proposed, namely a 100% tariff." Arbitrators emphasized that once this is done, the U.S. is free to pick any products from the list (not outside the list) that equals a total trade value but it does not exceed the amount of trade impairment.[5]Nothing in the provisions in the DSU provides the requirement of a list of products subject to countermeasures or retaliation, therefore the injured party is free to set any products on the list and pick them freely. Since

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[1]*European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas),* Decision of the Arbitration,April 9, 1999, WTO Doc. *WT/DS27/ARB*, para. 6.3. Arbitrators stated that "we agree with the United States that this temporary nature (of countermeasures) indicates that is the purpose of countermeasures to induce compliance"

[2]The Article 22(8) DSU provides "the suspension of concession or other obligations shall be temporary and shall only be applied until "such time" as the measure found to be inconsistent with a covered agreement has been removed..."

[3]*European Communities – Regime for the Importation, Sale and Distribution of Bananas (EC – Bananas), Recourse by the United States to Article 22 (2), WT/DS27/43,* 14 January 1999.

[4]The Article 22(4)DSU. See also *European Communities – Measures Concerning Meat and Meat Products (Hormones) – Original Complaint by the United States – Recourse to Arbitration by the European Communities under Article 22 (6) of the DSU,* WT/DS26/ARB, 12 July 1999.

[5]*Ibid*

the injured party uses lists for practical reason, the itemization of potential target products serves to notify elements of the private sector in the territory of non-compliant member.

WTO retaliation in general is utilized to prevent continued losses for injured party in the future. However, this can be costly to the non-compliant party, and unfortunately the economic impact of the WTO retaliation will depend on the size of the economies involved, the degree of bilateral trade between the two nations and the composition of this trade and its relative importance. The impact will also depend on the ability of the industries targeted to adjust to the punitive tariffs, or to find alternative markets for the goods that subject to retaliation. This situation might be workable for the world trade major player or developed country. Conversely, the economic impact of WTO retaliation would probably different when a small economic country which is dependent on the defendant country as the only possible source of its exports.

WTO retaliation implies unfortunate condition to trade player within the disputant countries. In *Banana Case*, DSB determined that the EU import regime for bananas violated WTO non-discrimination principle.[6] In 1999, DSB authorized the U.S. to suspend tariff concessions up to US$ 191.4 million per year on imports of EUproducts in attributable to non-compliance of EU to Panel and Appellate rulings and recommendation.[7] The U.S. levied 100% *ad valorem* customs duties on imports of various EU – origin goods, such as batteries, bed linen, paper boxes, spectacles cases and bath products.[8]This prohibitive tariff is consequently damaging trade benefits of certain EU exporters. These EU exporters – none of whom were involved in bananas – finally sued the Council of the EU (hereinafter the Council)andthe European Commission (hereinafter the Commission) in damages.[9]

The WTO retaliation seems unfair for industries that affected by this countermeasure. In *Brazil Aircraft* case, some domestic industries such as industries of iron products, agricultural products, textiles and low technology products are affected industries if Canada imposed a 100% punitive tariff. Brazil should be able to clear these products through other international markets, in the light of the relatively limited quantities sold into Canada. As a

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[6]*European Communities – Regime for the Importation, Sale and Distribution of Bananas Complaint by the United States*, WT/DS27/AB/R, Panel report as modified by Appellate in WT/DS27/R/USA.

[7]*European Community – Regime for the Importation, Sale and Distribution of Bananas; Recourse by the United States to Article 22 (2) of DSU, WT/DS/27/43,* 14 January 1999.

[8]*Ibid*

[9]Joined Cases C--120/06 P and 121/06 P, *FabbricaItalianaAccumulatoriMotocarriMontecchioSpA (FIAMM) and Others v. Council and Commission* and *Giorgio Fedon&FigliSpA and Others v. Council and Commission* [2008] ECR I--6513 (hereinafter: Joined case *FIAMM and Fedon*).

result, a punitive duty of 100% can be expected to shut off trade in the majority of products imported from Brazil.

The main purpose of Article 22 DSU is promoting compliance by the non-compliance party. The purpose is also not to punish nor coerce the country at fault, but rather to enable the injured party to recover by re-levelling its trade. However, under the DSU rules, the government is using a suspension of concession or other obligation (retaliation) lacks any duty to mitigate the economic or social consequences to private economic actors. Many of these actors will be innocent of any responsibility for the WTO violation that underlies the case. In the case of *EC – Bananas III*[10], Ecuador intent to impose cross retaliation under Trade-Related aspect on Intellectual Property Rights (hereinafter TRIPs) that can generally be expected to have a significant impact on key industries and thereby provide a strong incentive to industrialized countries to comply with WTO rulings. However, after negotiation with EU, Ecuador opted not to implement its authority to cross retaliation, since the EU has given attention on Ecuador's demands in regard with quota of banana import.

One question may arise relating to the implementation of WTO retaliation is who are the most affected parties by the adoption of retaliation measure? Alemmano mentioned that private economic actors are the most affected party. They are actors participating in the global market. The actors can be natural persons, business corporations, partnerships or labour union. They operate as producers, consumers, exporters or importers. Alemmano distinguished between two categories of private economic actors. Firstly, private companies in the winning countries whose exports continue not to receive the benefits that are normally entitled to, and secondly, companies in the losing countries that are affected by the retaliation or cross retaliation.[11] Unfortunately, although these private economic actors are the most affected parties by WTO countermeasure, WTO rules do not provide rights directly to them nor a direct access to the dispute settlement mechanism.

WTO rules do not provide direct rights and obligations to the private economic actors. The rights and obligations of private economic actors are substantively given by the government of the WTO Members. When a WTO Member is dealing with WTO rules for instance TRIPs, the government should give rights to individual who is holding exclusive

[10]European Community – Regime for the Importation, Sale and Distribution of Bananas; Recourse by the Ecuador to Article 22 (2) of DSU, *WT/DS27/ARB/ECU*.

[11]Alemmano, Alberto, (2008), 'Private Parties and WTO Dispute Settlement System, Who Bears the Costs of Non –Compliance and Why Private Parties Should Not Bear Them', in Essays on *the Future of the World Trade Organization; Vol. II The WTO Judicial System: Contributions and Challenges*, ed. Chaisse, Julien, and Balmelli, Tiziano, Editions InteruniversitairesSuisses – Geneva/Switzerland, pp. 37.

property rights such as copyrights, patents, trademarks, geographical indications, industrial designs and undisclosed information.[12] General Agreement on Trade in Services (hereinafter GATS) applies the Most – Favoured-Nations (MFN) and National Treatment principles to economic actors, namely "services suppliers".[13] These principles also apply to products that exported and imported among WTO Members pursuant to General Agreement on Trade and Tariff (hereinafter GATT) rules.[14] The substantive rights apply directly from national law of WTO Members to the private economic actors in the context of implementation of TRIPs, GATS and GATT. When a dispute arises and a non- compliance party ignores the DSB recommendations and rulings, then the injured party intent to impose countermeasure, private economic actors may run risk of not being protected by a system that on the one hand make them bear all the costs of the countermeasures. It is clear that WTO retaliation likely to influence the private economic actors. Private economic actors are powerless to bear trade damage caused by the WTO retaliation in consequence of non-compliance of their governments to WTO rules. State should therefore endorse a feasible system to ensure its citizen to obtain redress when their rights are infringed by the disobedience of its government to WTO rules. State liability may be viewed as an important remedy for private economic actors whose seek compensation. However countries seem implementing state liability principle differently.

1) Non-contractual Liability in the European Union

The state liability principle in EU is divided into liability of State Member which is underpinning of *Francovich and Bonifaci v. Italy case*[15], and liability of EU Institutions under Article 340 (2) of Treaty Functioning of European Union (hereinafter TFEU). This principle lays down the basic argument that Member State or EU Institutions should be required to pay a private litigant for losses caused by the violation of EU Law. For the explanation of Article 340 (2) of TFEU, EU however, seeks to address the situation where an EU Institution has caused an individual to suffer loss through the exercise of its general legislative or

[12]Agreement on Trade – related aspects of Intellectual Property Rights (hereinafter GATS), Article 41, (1995) in *The Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge University Press – Cambridge/UK, pp.20

[13]Zdouc, Werner, (February,1999), 'WTO Settlement Practice Relating to the GATS', *Journal of International Economic Law,* Vol. 2, pp. 295.

[14]General Agreement on Tariffs and Trade, Articles I and III, The WTO Legal Text, (1995), *The Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge University Press- Cambridge/UK.

[15]Joined cases C-6/90 and C-9/90, *Andrea Francovich and DanilaBonifaci and others v Italian Republic* (hereinafter Francovich Case), (1991), ECR *at I-5371*

administrative function. Nevertheless, due to adjudication proceeding, the court proceeded to outline three conditions for the availability of this right to damages for the implement a directive. 1) The results prescribed by the EU rules of laws entail the grant of rights to individual. 2) The breach is sufficiently serious; and 3) there is a causal link between the breach and the damage suffered by the claimants.[16]

In 2000, when several EU companies brought proceedings before EU Courts in order to claim compensation for damages allegedly caused by the increased retaliatory duties in their export that imposed by the U.S.[17], the European Court of Justice (hereinafter ECJ) dismissed the compensation claims in its judgments.[18] The ECJ judgment was denying direct effect[19] to the WTO Agreement and to DSB ruling and recommendations; it was also rejecting the applicant's main claim for compensation by refusing to identify an "unlawful act". According to the judgment, the plaintiffs could not show that the loss and damage was identifying as unlawful act.

2) Political Accountability in the United States of America

In contrary to EU, theUnited States generally possess state sovereign immunity from private damage claims for violation of federal law. Nevertheless, this state sovereign immunity principle is subject to a number of qualifications. Congress enjoys some authorities to waive the state sovereign immunity doctrine such in the course of passing generally applicable rules to regulate the commercial life of the nation. It ordinarily may not overcome state immunity as to render states liable to private individuals. In addition the Constitution

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[16]*Ibid*, Paragraph 40

[17]The DSB adopted both Appellate Body report of 9 September (WT/DS27/AB/R) and the Panel Report, as modified by the AB of May 1997 (WT/DS27/R/USA). The US obtained authorization from DSB to suspend tariff concessions and related GATT obligations with respect to imports from EU up to US$ 191,4 million per year (WT/DS/27/49, 9 April 1999, WT/DSB/M/59, 3 June 1999).

[18] Joined Cases FIAMM &Fedon, *Supra Note* 9. The claim is brought pursuant to Articles 225, 235 EU confer jurisdiction on the GC, and according to Art. 288(2) EC (Article 340 TFEU), "the community (EU) shall, in accordance with the general principles common to the laws of the Member States, take good any damage caused by its institutions in the performance of its duties. See also Partiécologiste 'les verts' v. European Parliament, case 294/83, 23 April 1986. Available at: (http://www.ena.lu/) last visited 16 September 2009.

[19]Direct effect is a principle of EU law that is applied to those aspects of EU Law. Direct effect is enforceable directly by EU citizens in their own Member state, regardless of whether the Member State has introduced specific national laws to implement the provisions. It can apply in relation to EU regulations, directives, Treaty provisions and decisions. The term 'direct effect' was first used by the European Court of Justice (ECJ) when it attributed to specific Treaty articles the legal quality of 'direct effect' in the case of *NV AlgemeneTransportenExpeditieOnderneming van Gend en Loos v. NederlandseAdministratie der Belastingen*, Case 26/62 [1963]. Available at: (http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/directeffect.htm), last visited June 4, 2009 at 16:43 pm.

authorizes congress to approach rules of liability that run directly as state.[20] In the case of implications of WTO retaliation to several U.S. private economic actors, since the Uruguay Round Agreement Act (hereinafter URAA) do not recognize direct effect of WTO Law in the U.S, thus the political repercussion could be more significant. The U.S. Legislative Bodies apply its accountability by passing a package of subsidies in response to EU trade sanction that is initially imposed in 2004. The subsidies package – the Jumpstart Our Business Strength (JOBS) Act - as legislative remedy been provided to overcome the loss of trade several U.S. private companies due to punitive tariff that is imposed by EU. The JOBS Act momentum traces back to the retaliatory measures that is imposed by EU pursuant to DSB ruling and recommendation of *the FSC – ETI Case*.[21]

3. The Inquiry ofthe Research

The characteristic of recommendation and rulings from the WTO Dispute Settlement Body is the illegal measures conducted by a WTO member must be aligned on WTO rules. In case this does not succeed, the injured member can even resort to retaliation. It is possibly even involving industries that have little to do with those involved in the initial dispute. Moreover, the various consequences on the implementation of the WTO retaliation will associate with the trade damaging to private economic actors. This issue above entails three parallel questions to investigate. First, the research investigates how the implications of WTO retaliation for private economic actors within the country that is retaliated? Second, to what extent state liability is accomplished in order to compensate trade damage caused by WTO retaliation? Third, the research seeks into the possibility of legal solution for the implication of WTO retaliation.

4. The Objective of the Research

Those three parallel questions will accomplish the objective of the research that divides into two. The first, the research focuses on whether there are implications of the WTO retaliation to private economic actors within the countries whom the retaliation is instituted. It mainly to attest that WTO retaliation is not only a procedure of rebalancing trade

[20] See US Constitution Amendment 14 § 5 (providing for Congress to enforce the amendment through "appropriate legislation").

[21]The Dispute Settlement Body adopted the Appellate Body report on *United States - Tax Treatment for "Foreign Sales Corporations": Second Recourse to Article 21.5 of the DSU* by the EU (WT/DS108/AB/RW2) and the Panel report (WT/DS108/RW2), as upheld by the Appellate Body report.

concessions between Members to the dispute, but also a concept causally related to the incidence of morally significant harm, because it may directly affect to people from the country that loses case. Since private economic actors are the main trade player of the WTO rules, so that the WTO trade sanction could directly affect them. This research is an effort to develop different outlook regarding the evaluation of WTO retaliation.

The second, the researchfocuses on the responsibility of countries to rebalance the trade damage of theirs private economic actors caused by WTO retaliation. State liability principle may be viewed as an important remedy for private economic actors whose seek compensation. Nevertheless, due to legal system lays down in national constitution, state liability principle seems unyielding to conduct.

5. Methodology of the Research

The method used for the research relies on descriptive analytical approach. The first step is collecting primary resources involve International Law, U.S. Law and regulations, EU law and regulations, WTO Rules, International Agreements, Court Decisions and Customary International law relates to application of International Economic Law. The secondary resources involve the books, notices, and explanations of the laws, communications, documents, Articles, case-reports, news, historical records and court observation. Second step is mainly analysing data to discover the consequence of the implementation of WTO retaliation and its impact on the private economic actors within the countries which is retaliated. Case study is necessary in this step to reveal the consistency between the implementation of WTO retaliation to private economic actors and the effort of their governments to overcome the impact by implying state liability principle.

There are three variables correlateto each other in this research.First is the WTO trade retaliation, second is the private economic actor, and third is state liability principle. The correlation between first and second variable is the premise that trade retaliation is harmful for private economic actors, thus, it is necessary to prove the premise by elaborating the implication of WTO retaliation to private economic actors. Because of the premise that the implication of WTO retaliation is harmful to private economic actors, thus, it is necessary to analyse third variable, whether state liability is accomplished in order to give compensation of trade damage caused by the trade retaliation.

6. Structure of the Research

The structure of the research is divided into six chapters.

Chapter I: Trade Retaliation in the WTO Dispute Settlement System

There are essentially six phases in the WTO dispute settlement process, namely: consultation, the panel process, the appellate process, the recommendation and rulings, arbitration and surveillance of implementation. The surveillance of implementation basically is the final phase of the WTO dispute settlement process. Unless the loss party fails to implement the recommendations and rulings of DSB within the reasonable period of time, the injury party may recourse under Article 22(2) of DSU. In this chapter, the predominant issue is the implementation of Article 22(2) DSU which unquestionably have correlation with all aspects of the research. Theoretical analysis is needed in this chapter to describe the trade retaliation.

Chapter II: Private Economic Actors in the WTO

This chapter is dealing with explanation regarding the concept of private economic actors as the main player of international trade under the WTO rules. These players embark on across border trading since centuries ago under the auspices of their national trade policy. As legal entity, these players subject to rights and obligations derive from either national trade regulation or international trade law. Indeed, the today WTO rules do not directly provide rights and obligations to them, however, the government of the WTO Members who accommodates these rights and obligations to their private economic actors. They should be bridging the gap between WTO rules and the private economic actors.

The main idea of this chapter is to digest the role of private economic actors in the array of the WTO Agreementsbased on analytical approach upon each agreement such as GATT, GATS, TRIPS, SCM Agreement, SPS Agreement, Agricultural Agreement and,Textile and Clothing Agreement, private economic actors thus exist implicitly in the array of WTO Agreements. It shows that, first, WTO Agreements profoundly require the Members to consider the role of private economic actors as a trade player in the WTO, and second, some WTO agreements transmit obligation and rights indirectly to private economic actors and the government should ensure to take such measure to accommodate its private economic actors to comply with these obligations and to obtain their rights. In respect to the WTO dispute settlement, this chapter also describes the role of private economic actors in the dispute settlement system.

Chapter III: Theoretical Overview of State Liability in the European Union and the United States in terms of Seeking Compensation Caused by the WTO Retaliation to Private Economic Actors.

This chapter discusses theoretical background regarding perception of state liability principle in general. There are two types of state liability, first is international state liability which is coherence with the definition of international state responsibility. Second is state liability in the domestic level. State liability in the domestic level concerns the responsibility of government to protect individual right, where the main function of state liability principle is rectifying or compensating the damage caused by the infringement of individual right conducted by the government. This chapter also discusses the condition of state liability in EU and the U.S. The EU recognizes State Member Liability and EU Institution Liability based on non-contractual liability principle meanwhile the U.S. recognizes abrogation of state sovereign immunity which leads to state liability for unconstitutional act conducted by the government. In relation with the WTO Law, this chapter also discusses the effect of WTO Law in the EU and the U.S. legal systems.

Chapter IV: The Implication of WTO Retaliation to Private Economic Actors: To What Extent is State Liability Accomplished? Case Study

This chapter is discussing the brief enlighten of several cases that entails authorization of retaliation from the WTO. These cases are Banana case (the U.S. v. EU) and Foreign Sales Corporation/Extraterritorial Tax Income exclusion (FSC/ETI) case (the U.S. v. EU). The trade impact of WTO retaliation to private economic actors based on these cases divide in three different impacts. The first is the economic impact of 100% retaliatory tariff over several private economic actors both in EU and the U.S. The second is the legal implication of the WTO retaliation to private economic actors in the EU based on Banana case and the U.S. based on FSC Case. In Banana Case, DSB authorized the US to imply trade retaliation as a result of non-compliant of EU to the DSB Decision. The excess of EU non-compliant is a dispute between EU private economic actors and EU Institutions in *FabbricaItalianaAccumulatoriMotocarriMontecchio Spa* (hereinafter FIAMM) case where the EU non-contractual liability in this case is contested to be implied by the Court. The third is political implication of the WTO retaliation to private economic actors in the U.S based on FSC/ETI Case. The political accountability is challenged to be implied by the U.S. legislative bodies in order to comply with DSB Decision on FSC/ETI Case and to restraint the trade

damaged caused to the U.S. private economic actors. A critical analysis will be applied in order to develop the answer to what extent state liability is accomplished by both EU and the U.S. authorities.

Chapter V: The Friction between the WTO Law and State Liability

The preliminary hypothesisinstitute in chapter IV is that state liability is not accomplished because of a friction between state liability principle and the WTO Law. The friction occurs as a result of the absence of direct effect of WTO law and DSB Decision, thus, private economic actors are barred to rely on WTO Law and DSB decision to challenge the illegality of national trade policy which is violating the WTO Law. Chapter V is discussing about the pro and contra arguments regarding direct effect of WTO Law and DSB decision which leads to the friction between the WTO law and state liability.

Chapter VI: The Nexus between the WTO Law and State Liability Principle

In order to suppress the friction between WTO law and state liability principle, this chapter analyses the nexus between state liability principle and WTO law. It focuses on the conception of state liability that the government is obliged to protect constitutional right (such an economic right) by providing a system to compensate or to rectify the right that has been infringed, meanwhile, WTO law consist obligation of government to guarantee individual to pursue economic interest by providing the rule and mechanism to conduct economic activities across frontiers which the obligation to guarantee individual economic interest is pertinent to their obligation to protect and to preserve economic rights derive from their constitutions.

The analyses of the nexus between the WTO Law and state liability principle is to prove the final hypothesis that state liability can be accomplished in term of the implication of WTO retaliation to private economic actors.

Chapter VII: Conclusion and Recommendation

Chapter VII discusses the conclusion of this research and recommendation for future cases.

CHAPTER I

TRADE RETALIATION IN THE WTO DISPUTE SETTLEMENT SYSTEM

1. The General Overview of the WTO Dispute Settlement Process

The main objective of DSU is a central element to provide security and predictability to the multilateral trading system.[22] There are essentially six phases in the WTO dispute settlement process: consultation, the panel process, the appellate process, the recommendation and rulings, arbitration and surveillance of implementation. The surveillance of implementation basically is the final phase of the WTO dispute settlement process. Unless the loss party fails to implement the recommendations and rulings of DSB[23] within the reasonable period of time, the injury party may recourse under Article 22(2) of DSU. In this chapter, the predominant issue is the implementation of Article 22(2) DSU which unquestionably have correlation with all aspects of the research. Prior to it, six phases of WTO dispute settlement process will be elaborated in a brief enlightenment.

1.1. Consultation

Pursuant to Article 4 (1) DSU, a WTO Member has right to ask for consultation with another member, if it believes that the other member has violated a WTO Agreement or otherwise the member finds that other member nullified and impaired benefits accruing to it. Bearing in mind that the structure of consultation is undefined and there no rules for conducting them, members have to be entered into good faith.[24]

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[22]Article 3 (2), General Provision, Annex 2 Understanding on Rules and Procedures Governing the Settlement of Disputes. The Agreement on Establishing the World Trade Organization, *available at:*(www.wto.org/dispute settlement*)*. See Lester, Simon, Mercurio, Bryan, Davies, Arwel and Leiner, Kara Leitner, (2008), *World Trade Law, Text, Material and Commentary*, Hart Publishing – USA, pp.153. The DSU represents an important change from the dispute settlement system in the GATT, which is broader, efficient, predictable and reliable dispute resolution process.

[23]Article 2 of DSU, Administration, *ibid*.SeeWaincymer, Jeff, (2002), *WTO Litigation: Procedural Aspects of Formal Dispute Settlement*, Cameron May – London/UK, pp.78.*See also*Wouters, Jan Wouters and De Meester, Bart, (2007), *The World Trade Organization: A Legal and Institutional Analysis*, Intersentia – Antwerpen/Belgium, pp. 217. *See also* WTO Secretariat, (2004), A *Handbook on the WTO Dispute Settlement System*, A WTO Secretariat Publication: prepared for publication by the Legal Affairs Division and the Appellate Body, Cambridge University Press – Cambridge/UK.

[24]Waincymer,Jeff, *ibid*, p. 211, There are no specific controls over such informal consultations within the WTO system, because there are a number of potentially conflicting aims in the process, it is therefore difficult to identify an optimal procedures and obligations.*See also* Read, Robert, (2005), 'Trade Dispute Settlement Mechanisms: the WTO Dispute Settlement Understanding in the Wake of the GATT', in *the WTO and the Regulation of International Trade : Recent Trade Disputes between the European Union and the United States*, eds. Perdikis, Nicholas and Read, Rober, Edward Elgar Publishing – London/UK, pp.36.

The consultation phase is prerequisite before the request of panel establishment. It is the responsibility of the complainant and the respondent members to consult on the matter of dispute, and WTO Secretariat shall provide no support.[25] The only requirement is that the consultation should be notified to DSB. The defendant member should respond to the request of consultation within 10 days after the receipt of request, and consultation should be confidential.[26] If no response is given after 10 days, or does not enter into consultation within 30 days, the complainant member can directly request the DSB for the establishment of Panel.[27] The DSB shall establish the Panel, unless it is rejected by consensus.[28] Since consultation is a necessary step before the commencement of panel proceedings, the parties could request the establishment of panel only if the consultations fail to settle a dispute within 60 days after the date of receipt of request for consultations.[29] However, some members have purposed for shortening the period of time for consultation, so that they can proceed to another stage or to request establishment of Panel.[30]

There are various ways for parties to the dispute satisfied in consultations phase. For example member who initiates the consultations is withdrawing and not replacing the issue, even though the measure may have had some negative impact on its trade while it was enforce.[31] Another possible settlement may also be achieved, when the consultation lead to

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[25] See Zimmermann, Thomas Alexander, (2005), *Negotiating the Review of the WTO Dispute Settlement Understanding*, Cameron May – London/UK, pp. 61.

[26] Article 4 (6) of DSU, Consultation. See also *the Korea – Alcoholic Beverages Case*, the Panel held that the information acquired during consultations could be subsequently be used by any party in the ensuing proceedings, WT/DS75/18. 17-01-2000. *Available at* (http://docsonline.wto.org/imrd/GEN_searchResult.asp), last visited October, 14, 2009.

[27] Article 4 (3) of DSU. See also Matsushita, Mitsuo, Schoenbaum, Thomas J. and Mavroidis, Petros C. (2003), *The World Trade Organization Law, Practice, and Policy*, Oxford University Press- Oxford/UK, pp. 26.

[28] Article 6 of DSU, *Supra Note 22.*

[29] Article 4 (7) of DSU, *Supra Note 22*. See also Yang, Guohua, (2005), *WTO Dispute Settlement Understanding: Detailed Interpretation*, Kluwer Law International – The Hague/The Netherland, pp. 495.

[30] In the EC – *Trade Descriptive of Scallops* (WT/DS7/R). In this case Canada requested for the establishment of Panel prior to the expiration of the 60 days consultation period. *Available at:* (http://www.wto.org/english/tratop_E/dispu_e/disp_settlement_cbt_e/a1s1p1_e.htm) *last visited* October, 13 2009. *See also*Trebilcock, Michael J. and Howse, Robert, (2013), *The Regulation of International Trade* (Fourth Edition), Routledge – London/UK, pp. 121. In case of Fructose Corn Syrup, Appellate Body recommended that although consultation had not occurred Panel could be properly established.

[31] Some cases considers 'dropped' or 'to be withdrawn', for instance: US – *Tariff Increases* (Hormones Retaliation) (WT/DS39); EC – *Cheese* (WT/DS104);Pakistan – *Hides and Skin* (WT/DS107); US – *GroundnutQuotas* (WT/DS111); Argentina – *Pharmaceuticals* (WT/DS168); EC – *Rice Duties* (DS134); Turkey – *Pipe Fittings* (WT/DS208), EC – *Patent Protection* (WT/DS153); Greece – *Taxes* (WT/DS129); ect. *Available at:* (http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm) *last visited* October, 15 2009.

favourable change or clarification in the way that the measure at issue is to be applied. However, the initiate member can also withdraw the measure, but it is replaced with another measure, which may have WTO-inconsistency problems of its own.[32] The most favourable result is when parties to the dispute are reaching amicable settlement. On the contrary with the respect of the dropped cases, there was not agreed settlement; the parties shall recourse to Panel.[33]

The consultation is a preliminary stage to identify with the legal basis of claim and facts. It serves a very valuable function and seems to work quiet well for cases that do not go on to Panel and Appellate process.[34] It provides a mechanism that resolves most cases promptly than the other processes. Nevertheless, some problematic issues arise in this process due to the application of Article 4 (11) of DSU which provides that any member who considers that it has a 'substantial trade interest', could join a consultation process without the consent of the other members who initiated the consultation process.[35] Another problematic issues is notification to DSB, some disputes were settled without notification to DSB.[36] Despite the problematic issues regarding the consultation process, overall it has worked rather effectively. Unlike the Panel and Appellate process, the consultation process is more flexible for member to settle the dispute.

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[32]Malaysia – *Polyethylene (*WT/DS1); Korea – *Shelf Life*(WT/DS5); EC – *Grains*(WT/DS13); Poland – *Autos* (WT/DS19); Korea – *Bottled Water*(WT/DS20); Venezuela – *OCTG Imports*(WT/DS23); Japan – *Copyright*(WT/DS28); US – *Textile and Apparel I and II*(WT/DS85) and (DS151); Australia – *Coated Paper*(WT/DS119).

[33]Since the establishment of WTO in 1994 until 2009, 399 cases filed in the DSB. Most of the disputes started with consultation request. There are 107 disputes that did not result panel adoption. Available at: (http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm). See Zimmermann, Thomas Alexander, *Supra Note* 25, pp. 59-61.

[34] Davey, William J., 'Evaluating WTO dispute settlement: what results have been achieved through consultations and implementation of panel reports?', (2007), in *The WTO in the Twenty-first Century : Dispute Settlement, Negotiations, and Regionalism in Asia*, eds. Yasuhei Taniguchi, Alan Yanovich and Jab Bohanes, Cambridge University Press – Cambridge/UK, pp. 107. See also Martin, Mervyn, (2013), *WTO Dispute Settlement Understanding and Development*, MartinusNijjhoff Publisher – Leiden/The Netherlands, pp. 95-99. See also Trebilcock, Michael J, and Howse, Robert, *Supra Note* 30, pp. 136.

[35]Babu, R.Rajesh, (2005), 'Review of the WTO Dispute Settlement Understanding: Progress and Prospect', *Asian- African Legal Consultative Organization Quarterly Bulletin*, Vol. 2-3, New Delhi/India, pp. 55.

[36] Korean – *Inspection* (WT/DS3 and WT/DS41), US – *Auto* (WT/DS6), Japan – *Telecommunication Equipment* (WT/DS15), Brazil – *Autos* (WT/DS51, WT/DS52, WT/DS65,WT/DS81),Mexico - Customs Valuation of Imports (WT/DS53),), US – *Poultry Imports* (DS100), Brazil – *Payment Terms* (WT/DS116), India – *Customs Duties* (WT/DS150), EC – *Conifer Wood* (WT/DS137).

1.2. The Panel Process

The complainant parties are entitled to request DSB to establish Panel if consultation process is fruitless. The request for the establishment of Panel shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint. If the parties request the special terms of reference, the proposed text of it must clearly set out in the request.[37] In the *EC – Banana Case III*[38], Appellate Body indicated profoundly major terms of Article 6 of DSU that a Panel request will usually be approved automatically at the DSB meeting unless the DSB decides by consensus not to establish a Panel.

Once DSB agree to establish Panel, the Panel is bound by its terms of reference.[39] On the *Brazil – Desiccated Coconut*[40], Appellate Body explained the importance of the terms of reference for two reasons. First, terms of reference fulfil an important due process objective – they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the Panel by defining the precise claims at issue in the dispute. In terms of defining the precise claims at issue, Panel shall address the relevant provision in any covered agreement or agreements cited by the parties to the dispute, they also should not conduct *de novo* nor act *ultra petita*, in addressing issue of the claims. As explain in *Mexico – Corn Syrup Case*[41], Appellate Body defined that Panel shall come under the duty to address the issues as a matter of due process. Hence, to conduct proper exercise of the judicial function, Panel is required to address issues that put before them by the parties. Panel also has to address and dispose of certain issues of a fundamental nature of the case.

To begin with assessing the dispute stipulates in the terms of reference, Panel shall follow the Working Procedures underlies in Appendix 3. Article 12 of DSU states the

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[37]Article 6 (2) of DSU. This article is addressing the task of Panel to examine request for establishment which must be sufficiently precise. See also United *States-Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, (WT/DS213/AB/R), 28-11-2002.

[38]*European Communities - Regime for the Importation, Sale and Distribution of Bananas* - AB-1997-3 - Report of the Appellate Body, (WT/DS27/AB/R), 09-09-1997.

[39]Article 7 of DSU also states within twenty days from the establishment of the Panel, a panel is given the following standard of reference unless the parties agree otherwise.

[40]*Brazil - Measures Affecting Desiccated Coconut* - AB-1996-4 - Report of the Appellate Body, (WT/DS22/AB/R), 21-02-1997.

[41]*Mexico – Anti – Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of DSU by the United Stated*, (WT/DS132/AB/RW), 22-10-2001.

Working Procedures of the Panel unless Panel decides otherwise after consulting with the parties to the dispute. Working procedures of the Panel elucidates obligations of Panel regarding the flexibility of time frame in assessing the dispute; however, Panel should not disregard observation of due process carefully. In *Australia – Salmon Case*[42], Appellate Body reported that Panel procedures should provide sufficient flexibility so as to ensure high-quality Panel report, without unduly delaying the Panel process. Meanwhile, Panel should also be careful to observe due process, which entails providing the parties adequate opportunity to respond to the evidence submitted in their submission. The submission of the parties must be written in certain timetable.[43]

The main important aim set out in Article 12 is *basic rationale* behind the any findings and recommendations of Panel.[44]*Basic rationale* constitutes the scope of duties imposed on panels under Article 12 (7) of DSU. In defining *basic rationale,* Appellate Body considered that Article 12(7) establishes a minimum standard for the reasoning that Panels must provide in support of their findings and recommendations. Panel must also set forth explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings and recommendations.[45]

The Panel process elaborated above are converging on the aim of Article 11 of DSU, where Panel function is to assist the DSB in discharging its responsibility under DSU and covered agreements. Accordingly, Panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreement. Refer to it; Panel should apply an appropriate standard of review under the covered agreements. In *EC – Hormones Case*[46], the

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[42]*Australia – Measures Affecting Importation of Salmon*, (WT/DS18/AB/R), 20 -10-1998.

[43] Article 12 (5) of DSU, *Supra Note 22*. See Slotboom, Marco, (2006), *A Comparison of WTO and EC Law: Do Different Objects and Purposes Matter for Treaty Interpretation?*, Cameron May Publisher – London/UK, pp. 231. Article 12 of the DSU gives WTO Panel discretion to depart from and to add the Working Procedures set out in Appendix 3 of the DSU, accordingly the WTO Panels should provide sufficient flexibility so as to ensure high quality panel report while not unduly delaying the Panel process.

[44]Article 12 (7) of DSU elaborates that Panel shall set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any finding and recommendations that it makes.

[45]In Mexico – Corn Syrup Case, *Supra Note 41*, Appellate Body turned first to dictionary meaning of 'basic', which includes both 'fundamental; essential' and constituting a minimum acceptable level'. 'Rationale' means both a 'reasoned exposition of principles; an explanation or statement of reasons' and 'the fundamental or underlying reason for basis of a thing of justification'. The Panels must provide directly linked by the wording of Article 12(7) to the finding and recommendations made by them.

[46]*United States - Continued Suspension of Obligations in the EC - Hormones Dispute - AB-2008-5 - Report of the Appellate Body*, (WT/DS320/AB/R),16-10-2008.

Appellate Body held that the applicable of standard of review under Article 11 of DSU is neither *de novo* review nor the total deference, but rather the objective of the assessment of the facts. It refers to the case of *EC - Poultry*[47] when Appellate Body warned that Panel is obliged to conduct the objective assessment of the matter before it, otherwise the allegation of it constitutes a very serious allegation. Such an allegation goes to the very core of the integrity of the WTO dispute settlement process itself. Another serious allegation that Panel might be doing is acting *ultra petita*. In *Chile – Price Band System Case*[48], Appellate Body considered that Panel has acted inconsistently with Article 11 of DSU since Panel had made a finding on a claim that was not made by Argentina. Furthermore, the Panel assessed a provision that was not a part of the matter before it.[49] Accordingly, by acting *ultra petita*, Panel constituted depriving one party of a fair right of response. Nevertheless, in making an objective assessment of the matter before it, Panel is also duty bound to ensure that due process of fair right of response is respected.[50]

To be consistent with the duty in imposing assessment of the matter before it, Panel requires finding an objective assessment of the fact. Panel is necessary to consider the evidence presented by the parties and to make factual findings on the basis of that evidence. In *EC – Hormones Case*[51], Appellate Body considered that the wilful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the facts. In supporting an objective assessment of the facts, Panel has right to consult to experts[52]. Refer to *India – Quantitative Restrictions Case*[53], Appellate Body made

[47]*European Communities- Measures Affecting the Importation of Certain Poultry Products*, (WT/DS69/AB/R), 13-7-1998.

[48]*Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Product*, (WT/DS207/AB/R), 23- 9-2002.

[49]In terms of reference of Panel, Article 7 of DSU limited the authority of Panel to assess the dispute only in the scope of claim written by the parties in the first sentence. See also *Argentina – Safeguard Measures on Imports of Footwear*, (WT/DS121/AB/R), 14-12-1999.

[50]Chile – Price Band System, *Supra Note 48.* Due process is an obligation inherent in the WTO dispute settlement system. A Panel will fail in the duty to respect due process if it makes a finding on a matter that is not before it, because it will thereby fail to accord to a party a fair right of response. Panel considers acting beyond the requirement to asses objectively and in good faith.

[51] EC – Hormone Case, *Supra Note 4.*

[52] Article 13 of DSU mentions that Panel has right to seek information and technical advice from any individual or body includes the experts relating to the case.

[53]*India– Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, (WT/DS90/AB/R), 23-8-1999.

statement that although Panel has right to consult to expert such International Monetary Fund (IMF), Panel did not delegate to the IMF its judicial function to make an objective assessment of the fact. Panel should make carefully and critically assessment of any views made by the experts and also considered other data and opinion in reaching its conclusions. In assessing the dispute, Panel is necessary to consider the municipal law of the parties, as evidence of facts. However, the municipal law of WTO Members may be considered not only as evidence of facts, but also as evidence of compliance or non-compliant with international obligations.[54] Under DSU, Panel may examine the municipal law of a WTO Member for the purpose of determining whether that Member has complied with its obligations under the WTO Agreements.

Once Panel concludes that a member's measure is inconsistent with a covered agreement, it shall recommend the member concerned brings that measure into conformity with the agreement.[55] Panel should submit its finding and conclusions in the form of written report to the DSB. A Panel report must, at minimum, set out the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes.[56] The report become legally binding when it is adopted by the DSB and thus have become the recommendations and rulings of the DSB, unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. If a party has notified its decision to appeal, the report by the panel shall not be considered for adoption by the DSB until after completion of the appeal.[57]

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[54]*United States – Section 211 Omnibus Appropriations Act of 1998*, (WT/DS176/AB/R), 2-1-2002. See also *Case concerning certain German interests in Polish Upper Silesia (The Merits*),(22 March 1926), Publications of the Permanent Court of International Justice Series A – No.7 (Annex II); Collection of Judgments, A.W. Sijthoff's Publishing Company – Leiden/Netherland. In this merit, the court is certainly not interpreting the municipal law of the party, but there is nothing to prevent the court to give judgment on the question whether or not, in applying that law, party is acting inconformity with its obligations toward international law.

[55]Article 19(1) of DSU.*See also* Bourgeois, J.H.J., (2005), *Trade Law Experience: Pottering about in the GATT and WTO*, Cameron May Publisher – London/UK, pp. 34. The discussion about whether WTO remedies are prospective only or also retrospective focuses on Article 19, accordingly Panel or Appellate Body urge the member to concerned bring the measure in to conformity.

[56]Article 12(7) of DSU; see also Van den Bossche, Peter, (2005), *The Law and Policy of the World Trade Organization; Text, Cases and Materials*, Cambridge University Press – Cambridge/UK. pp. 253

[57]Article 16 (4) of DSU. See Fabri, Helene Ruiz, (2013), 'The Relationship between Negotiations and Third-Party Dispute Settlement at the WTO, with an Emphasis on the EC-Banana Dispute', in *Diplomatic and Judicial Means of Dispute Settlement*, eds. Chazournes, Laurence Boisson de, Kohen, Marcelo G., and Vinuales, Jorge E., MartinusNijhoff Publishers – The Hague/the Netherlands, pp. 93. In Banana Case EU

1.3. Appellate Body Process

The dispute settlement system in the WTO allows the parties to appeal against a panel report and take it to a *quasi-judicial* body at a second instance. As enlighten in Article 17 of DSU, a standing Appellate Body shall be established by the DSB and hear appeals from Panel cases. It is composed of seven persons and as general rule; the proceeding shall not exceed 60 days from the date a party to the dispute formally notifies its decision to appeal to the date the Appellate Body circulates its reports. Unless the Appellate considers that it cannot provide report within 60 days, it can be exceeded until 90 days.[58]

The Appellate Body process is bound to Working Procedures set out in Article 17 (9) of DSU. The Working Procedures of Appellate Review underlies in Section XXXII of DSU, and it shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and also communicated to the members for their information. Once Working Procedures are setting up by the Appellate Body, they are bound to review the case pursuant to Article 17 of DSU.

Article 17(6) of DSU provides that only issues of law and the legal interpretation developed by a panel can be reviewed by the Appellate Body. The Appellate Body has to address all issues that are brought up by the complaining parties before it,[59] and it shall not address new fact, issues or argument in its proceeding.[60] Appellate Body merely is bound duty completing the analysis made by Panel. As explained in *United States – Gasoline*

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had failed to comply in DSB Recommendation, thus the DSB Agree to extension of the time period of 30 days according to Article 16 (4) of the DSU.

[58]In some cases Appellate Body extend of the deadline for its report, such as, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, (WT/DS138/AB/R), 10-5-2000, *Thailand – Anti – Dumping Duties on Angles Shapes and Sections of Iron or Non- Alloy Steel and H-Beams from Poland*, (WT/DS122/AB/R), 12 -3-2001, and *European Communities – Measures Affecting Asbestos and Asbestos – Containing Products*, (WT/DS135/AB/R), 12-3-2001.

[59] See also Case *Australia – Measures Affecting Importation of Salmon*, *Supra Note* 42.

[60]In *European Communities – Anti – Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, (WT/DS219/AB/R), 22-6-2003, Appellate Body rejected the EU's argument that was identifying during the Panel proceedings. Also in *Canada – Measures Affecting the Export of Civilian Aircraft*, (WT/DS70/AB/R), 2-8-1999, Appellate Body stated that an appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. Also in case of *the United States – Continued Dumping and Subsidy Offset Act of 2000*,(WT/DS217/AB/R and WT/DS234/AB/R), 16-1-2003, Appellate Body had no authority to consider new facts on appeal.

Case[61], Appellate Body posited that they should reverse the Panel findings and complete the analysis of the case. Similar to *EC – Poultry Case*[62], Appellate Body elaborated Article 17(13) of DSU that they may uphold, modify or reverse the legal findings and conclusions of panel.

1.4. Recommendations and Rulings

The predominant function of Panel and Appellate body is assessing whether a Member's measure is inconformity with the covered agreement and whether it is nullifying and impairing[63] benefits accruing to other member's trade. Once Panel or Appellate Body concludes that a measure is inconsistent with a covered agreement[64], it shall recommend that the member concerned should bring the measure into conformity with the agreement. Panel and Appellate Body may suggest ways in which the member concerned could implement the recommendation. Refer to the case of *US - Underwear*[65] , Panel recommended the DSB to request the United States bring its measure into compliance with the Agreement on Textiles and Clothing by immediately removal of the measures that is further causing nullification and impairment of benefits accruing to Costa Rica. The recommendation is also in the form of decline the request of the party, as Panel noted in *Guatemala – Cement II case*[66] that Panel declined to suggest Guatemala to refund antidumping duties regarding the import of grey Portland cement from Mexico, however Panel only suggested Guatemala to revoke its anti-dumping measure that inconsistent with WTO rules.

[61]*The United States – Standards for Reformulated and Conventional Gasoline*, (WT/DS2/9/AB/R), 20-5-1996. In this case Appellate Body reversed of Panel's legal finding and made a finding on a legal issue which was not addressed by the Panel. Appellate Body reversed the Panel conclusion on the first part of Article XX (g) of GATT 1994 and completed it. In this case, Appellate Body also examined the measure's consistency with the provision of Article XX based on the legal findings contained in the Panel report.

[62]*The European Communities – Measures Affecting the Importation of Certain Poultry Products,Supra Note* 47.

[63]The issue of nullification and impairment arose in *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Supra Note 38*. EU appealed the conclusion of Panel that 'there is normally a presumption that a breach of the rules has an adverse impact on other members parties to that covered agreement', Appellate observed that according to Article 3(8) of DSU, nullification and impairment issue is a basic standing the US to bring a claim before the Panel.

[64]See *India – Measures Affecting the Automotive Sector*, (WT/DS146/R and WT/DS175/R), 21-12-2001. Panel noted that the case envisages a situation where the violation is in existence.

[65]*United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear*,(WT/DS24/AB/R),10-2-1997.

[66]*Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*,(WT/DS156/R),24-10-2000.

Another issue relating to the recommendations and rulings of Panel and Appellate Body is both Panel and Appellate body should be vigilant in recommending the conclusion of the dispute. Addressing to this issue, many members concerned that Appellate Body was exceeding its authority and created new rights and obligations through its ruling[67]. It is remarkably notice set out in Article 19(2) of DSU that Panel and Appellate Body cannot add or diminish the rights and obligations in the covered agreement when they make findings and recommendations. In *US – Certain EC Product Case*[68], Appellate Body ruled that the purpose of dispute settlement is only to preserve the rights and obligations of members under the WTO Covered Agreements, and to clarify the existing provision of those agreements in accordance with customary rules of interpretation of public international law. Nothing from Panel and Appellate findings can exceed beyond the interpretation of WTO Covered Agreement.

In *Australia – Automotive Leather II Case*[69] , Panel addressed the issue of relationship between related covered agreements such Agreement of Surveillance and Countervailing Measures (hereinafter SCM) and Article 19(1) of DSU. Panel thereby elucidated the interpretation of Article 4(7) of the SCM Agreement seems redundant, since Article 19(1) of DSU that emphasizes the member to "bring the measure into conformity" is indistinguishable from the interpretation of Article 4(7) of the SCM Agreement.[70] Panel and Appellate Body are also bond duty of making interpretation on the provision relevant to the dispute in accordance with the general rule of interpretation. The general rule of interpretation set out in Article 31(22) Vienna Convention of Treaty is directing the Appellate Body to apply in seeking clarification of the provision of the WTO Covered Agreement. That direction reflects

[67]Babu, R.Rajesh, *Supra Note 35*, Special Review of DSU has been established since the Marrakesh Ministerial Meeting is held; many members submitted the proposal to review a number of issues includes the function of Appellate Body to recommend the conclusion of the dispute. Addressing this issue, the US and Chile in a joint proposal has submitted six options aimed at providing parties to the WTO disputes more control over the content of Appellate Body reports, as well as the course of the dispute settlement proceedings.

[68]*United States – Import Measures on Certain Products from the European Communities*, (WT/DS165/AB/R), 11-12-2000. See also Sean D. Murphy, (2002), *United States Practice in International Law, Volume 1: 1999-2001*, Cambridge University Press – Cambridge/UK, p.256.

[69]*Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21(5) of DSU by the United States*,(WT/DS126/RW), 21-1-2000.

[70]Article 4(7) of the SCM Agreement requires member to 'withdraw the subsidies' which is requiring some actions. It is different from 'bring the measure into conformity' according to Article 19(1) of DSU.

a measure of recognition that covered agreement is not to be read in clinical isolation from public international law.[71]

After Panel or Appellate Body conclude the case and submit its recommendation to DSB, the time frame of adopting the rulings no later than 9 months since the DSB establish the Panel. The time will be exceeded until 12 months if the report is appealed.

I.5. Surveillance of Implementation Recommendation and Rulings

The implementation of recommendations and rulings of the DSB is the most crucial point for the entire WTO dispute settlement mechanism. The very objective of attaining security and predictability of the WTO legal system principally depends on the compliance and enforcement of the recommendations and rulings. Since the recommendations itself has no value unless the parties to the dispute implement it. The method to implement the recommendation can be done by withdrawal or modification of a measure, or part of measure, the establishment of application of which by a member of the WTO constitutes the violation of a provision in a covered agreement.[72]

Article 21(6) of DSU states the DSB shall keep under surveillance the implementation of adopted recommendations or rulings. The issue of implementation of the recommendations or rulings may be raised at the DSB by any members at any time following their adoption. Accordingly, the members should implement the recommendation or rulings immediately, in a case that immediate compliance is impracticable, Article 21(3) of DSU provides a reasonable time for the member to bring itself into a state of conformity with its WTO obligation.[73] The concept of reasonable period of time is elaborated in *US – Hot-Rolled Steel (Article 21(3))*[74] by Arbitrator. It implies a degree of flexible time to comply with the recommendations or rulings. Arbitrator considered that the essence of reasonable period of time set out in covered agreement such Anti – Dumping Agreement should equally pertinent in the context of Article 21(3) (c) of DSU. It also should be defined on a case by case basis,

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[71] See US – Gasoline Case, *Supra Note 61*,

[72] See *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, *Resort to Arbitration under article 21(3) of DSU* , (WTO/DS155/10), 31-8-2001.

[73]See *Chile – Taxes on Alcoholic Beverages, Arbitration under Article 21(3) (C) of DSU,* (WT/DS87/15 and WT/DS110/14), 23-5-2000. See also *United States – Continued Dumping and Subsidy Offset Act of 2000*, (WT/DS217/14 and WT/DS234/22), 13-6-2003.

[74]*The United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, (WT/DS184/AB/R), 24-6-2001

for example in *EC – Hormones (Article 21(3)*[75] case, the Arbitrator considered that the ordinary meaning of the terms of 'reasonable period time' indicates to 15 months as a guideline for the arbitrator, and not a rule.[76]

1.6. Arbitration

WTO dispute settlement mechanism recognizes Arbitration as a different and alternative procedure for parties to settle their dispute. According to Article 25 of DSU, the parties may recourse Arbitration to facilitate the solution of certain disputes that concern issues that are clearly defined by them. Arbitration process therefore requires mutual agreement of the parties, except as otherwise provided in DSU. The parties to the arbitration proceeding shall also agree to abide by the Arbitration award.

The first case recourse to Arbitration since the inception of the WTO is *US – Section 110(5) Copyright Act Case*[77]. In this case, Arbitrator observed that Article 25 of DSU provides a different procedure that the parties have alternative whether notify the DSB to establish Panel or refers matters to Arbitration. The parties to this dispute only had to notify the DSB of their recourse to Arbitration, and there is no decision required from the DSB for a matter referred to Arbitration. Arbitrator is bound duty to apply all the rules and principle governing the WTO system.

Arbitration can imply its jurisdiction regarding its function as an international tribunal. In the *US – Anti-Dumping Act of 1916 Case*[78] the Arbitrators therefore considered that they are entitled to consider the issue of its own jurisdiction on its own initiative. The jurisdiction in this case is not a unilateral extension of the WTO jurisdiction, since it is dependent on the agreement of the parties to a dispute to have recourse to Article 25 of DSU.[79] The Arbitration

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[75] EC - Hormone Case, *Supra Note 4*.See also case *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, Resort to Arbitration under article 21(3) of DSU, Supra Note* 72. Argentina had argued that it needed 46 months as the reasonable period of time for implementation in order to control and counter certain economic and financial consequences that would follow the enactment of legislation implementing the recommendations of the DSB.

[76] It applies to the case involving developing country, see also*Indonesia – Certain Measures Affecting the Automobile Industry, Recourse to Arbitration Under Article 21(3) (C) of DSU*, (WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12), 7-12-1998.

[77]*The United States – Section 110(5) of the US Copyright Act, Recourse to Arbitration under Article 25 of DSU, Award of the Arbitrators*, (WT/DS160/ARB25/1), 9-11-2001.

[78]*The United States-Anti-Dumping Act of 1916*,(WT/DS136/AB/R and WT/DS162/AB/R), 28-8-2000.

[79] See the US – Section 110(5) Copyright Act, *Supra Note* 77, see also Palmeter, David, and Mavroidis, Petros C., (2004), *Dispute Settlement in the World Trade Organization; Practice and Procedure, Second Edition*, Cambridge University Press-Cambridge/UK, pp.45.

in WTO dispute settlement system principally has broad authority to assess the issue submitted by the parties to the dispute. However, disputes submitted to Arbitration mainly regarding the determination of level of nullification or impairment or the interpretation of Article 22 of DSU and determination of reasonable period of time in implementing the recommendation of the DSB. The member may also request Arbitration of a determination by the Committee on Subsidies and Countervailing Measures regarding a program qualified as a non-actionable subsidy pursuant to SCM Agreement.

Arbitration is considered an alternative to a panel procedure. Refer to *US – Section 110(5) Copyright Act Case*[80], Arbitrator noted that pursuant to Article 25(1) of DSU, Arbitration is an alternative means of dispute settlement that generally used to complete process of dispute settlement under DSU. It is not only be used to one aspect of the procedures such as the determination of the level of benefits nullified or impaired as a result of a violation, but also to other aspect such a mutually acceptable in negotiating compensation. This would seem to be confirmed by the terms of Article 25(4) of DSU which provides that Article 21 and 22 of DSU shall apply mutatis mutandis to arbitration award.

Furthermore, recourse to Arbitration pursuant to Article 25 of DSU is fully consistent with the object and purpose of DSU. It is likely to contribute to the prompt settlement of a dispute between members, as commanded by Article 3(3) of DSU. In general, recourse to Arbitration indeed strengthens the dispute resolution system. The Working Procedures of Arbitration set out in Article 22(6) of DSU, will follow the normal working procedures of DSU where relevant and as adapted to the circumstances of the present proceeding which Arbitrator attached it to their decision.

2. Nullification and Impairment as *Basic Rationale* Causes of Action

The WTO language of dispute settlement system focuses on Article 3(8) of DSU:

"In case where there an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge."

[80] *Ibid*

The core of Article 3(8) DSU is nullification or impairment which is coherent with Article XXIII of GATT 1947[81] as predecessor concept of basic claim in international trade remedy. In this article, nullification or impairment is considered as the result of failure of a contracting party to carry out its obligations, the application of any measures of a contracting party whether or not it conflicts with GATT, and the existence of any other situation.

As time went on, the concept of basic claim formulated in Article XXIII GATT remains become predominant concept in assessing dispute claimed by the WTO Member. This concept will be elaborated as violation claim basis, non-violation and existence of any other situation that is resulting nullification or impairment trade benefits of other member.

2.1. Violation Claim Basis

All WTO Members are bound to comply with Marrakesh Agreement in accordance with *pactasuntservanda* principle.[82] However, in light of considerable circumstances may arise in domestic level, some members are unable to specify in advance how they ought to behave under every conceivable contingency in applying obligations of WTO. For those members, to deviate from their commitments is inevitably, thus leading members to breach the obligations or violation of WTO Agreements.

The violation of WTO Agreements is triggering the complaining member to seek redress or to demand responsibility from violating member.[83] Refer to *India – Quantitative Restriction case*[84], when the United States considers that a benefit accruing to it under the GATT 1994 was nullified or impaired as a result of India's alleged failure to carry out its obligations regarding balance of payments. In this case, the articulation of "nullification or

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[81] Jackson, John H.,(1998), 'Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects', in *The WTO as an International Organization*, ed. Krueger, Anne O., The University of Chicago Press – Chicago USA/London/UK, pp. 166. In 1962, Uruguay brought case before Panel of GATT 1947, where the Panel introduced a revolutionary concept regarding of 'prima facie nullification or impairment'. In this concept, the breach of GATT would be prima facie nullification or impairment, and the responding party carried the burden of proof there was no nullification or impairment of benefits accruing other member.

[82] Article 26 of the Vienna Convention on the Law of the Treaty: "every treaty in force is binding upon the parties to it and must be performed by them in good faith."

[83]See Article 43 Notice of Claim by an Injured State, *Articles on Responsibility of States for Internationally wrongful Acts, adopted by International Law Commission, at its fifty-third session, 2001),*(extract from the Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10), chapter IV.E.1), state that 'an injured State which invokes the responsibility of another State shall give notice of its claim to that state'.

[84]*India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, Supra Note* 53. *See also*Amerisinghe, Chittharanjan F., (2009), *Jurisdiction of Specific International Tribunals*, MartinusNijhoff Publishers – Leiden/The Netherlands, pp. 357.

impairment as a result of India's violation of its obligation" should be emphasized as a notion of claim by the U.S.

Van den Boosche explains that "in only a few cases to date has the respondent argued that the alleged violation of WTO law did not nullify or impair benefits accruing to the complainant. In no case has the respondent been successful in rebutting the presumption of nullification or impairment. It is doubtful whether this presumption really is rebuttable".[85] It indicates that a party enables to rebut the presumption of nullification or impairment if it is proved contingency impact of nullification or impairment benefits accruing to other party. In *Turkey – Textiles Case*[86] albeit Turkey argued that India had not suffered any nullification or impairment of its WTO benefits, Panel determined that Turkey has not provided sufficient information to set aside the presumption of its measure has nullified and impaired the benefits accruing to India under GATT/WTO. Consequently, to rebut the presumption of nullification or impairment, Turkey shall be adequately proving it to the contrary.

2.2. Non Violation Claim Basis

Non Violation claim basis in the WTO dispute settlement system sets out in Article 26 of DSU. According to this article, a member who considers that any benefits accruing to it directly or indirectly under this Agreement are being nullified or impaired or that attainment of any objectives of the Agreement are being impeded as the result of the application by another member of any measure, whether or not it conflicts with the provisions of this Agreement, may submit its complaint to DSB. Complaining party is therefore bearing burden of proof to present a detailed justification in support of its complaint.[87] The detailed of justification must be tangible and concrete to prove the substantiation of a causal relation between the invoked measures and nullified or impaired benefits, and to this end broaden description of measure at issue is indispensable.

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[85] Van den Bossche, Peter, *Supra Note 56*, p. 193. See also Roessler, F. and Gappah, P. (2005),'A Re-appraisal of Non-Violation Complaints under the WTO Dispute Settlement Procedures', in *The World Trade Organization: Legal, Economic and Political Analysis*, Vol. I, eds. Macrory, P.F.J., Appleton, AE and Plummer, MG, Springer – New York/USA, pp.1371.Roessler mention that the non-violation remedy is best understood in the context of the original GATT, which had only limited coverage with regard to trade rules. It has been argued that the expansion of WTO rules to many new areas has made the non-violation remedy less important.

[86] *Turkey-Restrictions on Imports of Textile and Clothing Products*, (WT/DS34/R), 31-5-1999.

[87] See EC – Asbestos Case, *Supra Note 58*. See also Kim, Dae-Won, (2006), *Non-Violation Complaints in WTO Law: Theory and Practice*, Peter Lang – Bern/Switzerland, p. 77. In this case, Appellate Body therefore considered that the non-violation complaint as a remedy should be approached with caution and should remain as an exception. See also in regard with the standard of nullification and impairment, the Panel interprets as competitive relationship between imports and domestic product. This practical standard applied in GATT Article III (4) which makes distinction between violation and non-violation complain meaningless.

In the *Japan – Film Case*[88] Panel reviewed whether there was a measure that promulgated by responding party which was nullifying or impairing benefits of complaining party. In this case, Panel considered benefits that might be nullified or impaired to consist of enhanced market access arising from the change of competitive relationship brought about by tariff concessions, but it found that the U.S. as complaining party bore burden as to its 'legitimate expectations'[89] of benefits after successive tariff negotiation rounds. In order to meet this burden, the U.S. was required to show that Japanese measure at issue was not reasonably anticipated at the time the concessions were granted.[90] According to this case, the complaining party required to elucidate legitimate expectations of benefits that is nullified or impaired by responding party. However, in such case of non-violation claim basis, most Panel or Appellate Body shall recommend that the parties concerned make a mutually satisfactory adjustment.

2.3. The Existence of Any Other Situation

Similar to the non-violation claim basis, the claim base on the existence of any other situation shall present a detailed justification in support of its argument. Any other situation claim basis was designed to be used in situation such as macro economy emergencies i.e. general depressions, high unemployment, commodity price collapses, balance of payment difficulties.[91] Article 26 (1) (b) of DSU, point out the duty of Panel to prepare and circulate separate reports for violation and non-violation dispute with the other situation of dispute.

In principle, procedure burden of prove between non violation and the existence of any other situation claim basis is not different. The complaining party requires to bear burden of prove of nullification or impairment benefits accruing to it.

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[88] *Japan – Measures Affecting Consumer Photographic Film and Paper*,(WT/DS44/R), 22-4-1998.

[89] Refer to the doctrine of legitimate expectation which means an 'extension of the rules and natural justice and procedural fairness'. This doctrine has been recognized as an important principle guiding the interpretation of other obligations in international economic law; *inter alia* it can be referred from several WTO Panel decision. See also Dissenting Opinion in Arbitral Award, *International Thunderbird Gaming Cooperation (claimant) and the United Mexican States (respondent)*, before the Arbitral Tribunal constituted under Chapter Eleven of the North American Free Trade Agreement, Washington DC, 26-1-2006.

[90] Trachman, Joel P.,(1999), 'The Domain of WTO Dispute Resolution', *Harvard International Law Journal*, Vol.40 No.333, pp.27.

[91] See Nanto, Dick K., (2000), 'Dispute Settlement Under the WTO and Trade Problems with Japan', in *World Trade Organization: Issue and Bibliography*, ed. Babkina, A.M., Nova Science Publishing – New York/USA, pp. 37, Article 23 of DSU allows for a complaint if a member feels that the attainment of any objective of a WTO agreement is being impeded as a result of the failure of another party to carry out its obligations under an agreement, the application by another contracting party, or the existence of any other situation, thus the DSU are not limited to complaint about specific violations of agreements.

2.4. The Concept of Trade Nullification and Impairment in the WTO

Violation, non-violation and the existence of any other situation's claim bases constitute cause of action for WTO members to complain before the WTO dispute settlement body. However basic rationale of these claim bases is converging at 'nullification or impairment' concept. Article XXIII GATT provides that the nullification or impairment of benefits accruing to a member under the General Agreement of WTO is a legitimate basis for commencing a dispute settlement procedure. Abbot explained that GATT jurisprudence has interpreted nullification or impairment as 'any change in domestic economy policy that adversely affects imports could be considered to impair the benefits of prior tariff binding'.[92] In addition, Jackson explicitly mentioned that the phrase of nullification or impairment in Article XXIII GATT is ambiguous. It was not merely construed impair the benefits of member that could not reasonably been anticipated by the other member at the time it negotiated for a concession, but also the nullification or impairment could deter benefits in respect of reasonable expectation concept.[93] For example, in *Brazil – Financing Aircraft Case*[94], Canada as complainant implicitly brought issue of nullification or impairment in its claim before the Panel. Canada argued that nullification or impairment caused to its benefit in aircraft industry is calculating since 1994 after Brazil become member of WTO. It mentioned that the export subsidy created by Brazilian Government since 1991, reducing benefits of Canada in Aircraft industry since the export subsidy allured more international purchaser to opt purchase Brazilian aircraft. The *ProgramadeFinanciamentoàsExportaçaões (*PROEX) subsidy impeded the benefits that supposed to be gained by Canada prior 1998 and presumably will deter its benefits in the future if Brazil remains non conformity with SCM Agreement. This claim show that the concept of nullification or impairment is not merely addressing reasonable expectation concept, but also deter benefit prior the claim submitted by Canada.

However, the DSU merely recognizes concept of nullification or impairment close to the concept of injury in the law of contract that entails consequential damage and expectancy

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[92] Abbot, Kenneth W.,(1996), 'Defensive Unfairness : The Normative Structure of Section 301',*Fair Trade and Harmonization, Prerequisite for Free Trade?:Vol. 2 Legal Analysis,* eds. Bhagwati, Jagdish N. &Hudec, Rubert E., Massachusetts Institute of Technology Press – Massachusetts/USA. pp. 38.

[93] Jackson, John H., (1997), *The World Trading System, Law and Policy of International Economic System, Second edition*, Massachusetts Institute of Technology Press – Massachusetts/USA, pp.120.

[94]*Brazil – Export Financing Program for Aircraft, Report of the Panel*,(WT/DS46/R) 14-4-1999.

damage. The consequential damage does not flow directly from a breach of contract but from the consequences of the breach. These damages are, in a sense, one step removed from the breach itself. Consequential damage include those based on a loss of expected profits, often referred to as expectancy damages, and damages based on a longer term loss of benefits, often referred to as lost opportunity damages.[95] From this point of view, the nullification or impairment is deemed of losing the benefits accruing to the member under the covered agreement which is referred as consequential and expectancy damages. This concept is notably as basic rationale of cause of action in seeking adjustment by virtue of GATT Article XXIII.

3. Trade Remedy in the WTO Dispute Settlement System

The objective of WTO dispute settlement system is rebalancing trade concession which is impeded by the violating member; hence the violating member is obliged to comply with the recommendations and rulings of DSB. Article 21 of DSU therefore sets out the obligation of violating party to comply with recommendation and ruling of the DSB in such period of time. However, in such cases, some members find difficulty to comply due to further complicated by the fact that domestic regulatory system are heavily bureaucratized. There thus needs to be a procedural consensus among competing groups, based on the belief that lawmaking processes balance interest and alleviate unequal amounts of influence.[96]Furthermore, political and economic pressure that might affect a violating member's decision to carry on the recommendations and rulings of the DSB, leading to thecomplainant member accepting much less than full compliance,[97] or otherwise non-compliant measure.[98]

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[95]Fitsgerald, Jean, and Olivio, Laurence, (2005), *Fundamental of Contract Law, Second Edition*, Emond Montgomery Publications-Toronto/Canada, pp. 129.

[96]Zurn, Michael, and Joerges, Christian, (2005), *Understanding Compliance with International Law, Law and Governance in Postnational Europe: Compliance beyond the Nation-State*, Cambridge University Press – Cambridge/UK, pp. 312. See also Babu, R. Rajesh, (2012), *Remedies under the WTO Legal System*, MartinusNijhoff Publisher – Leiden/the Netherland, pp. 40-42.

[97]Van den Bossche, Peter, and Zdouc, Werner, (2013), *The Law and Policy of the World Trade Organization* (Third Edition), Cambdrige University Press – Cambridge/UK, pp.307.*See also*Brimeyer, (2001), 'Bananas, Reef, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations', *Minnesota Journal of Global Trade*, Vol. 10, No. 1, pp.133. Brimeyer argues that compliance is doubtful because of disagreement as to what full compliance entails. In some cases, it appears that the settlement system must be given the benefit of the doubt.

[98]See EC – Banana Case, *Supra Note* 38, In this case the idea of compliance is a political calculation – strengthening the political economy perspective- however EU preferred non-compliance as a result from a

In term of disagreement of compliance measure, Article 21 (5) of DSU notes that a party is possible to resort to the original panel to determine whether violating party taken measure to comply with the recommendations and rulings,[99] or the complainant party may recourse directly to Article 22 of DSU, if the compliance is not achieved by the deadline. These two articles have sequencing problem, where Hudec mentioned that implementation of Article 22 of DSU cannot be separated from the working of Article 21(5) of DSU.[100] However, it is possible to recourse to both articles simultaneously, as long as the parties would request the arbitrator to suspend its work in proceedings Article 22 until the adoption of the compliance panel under the Article 21(5) of DSU. Another possible way is direct recourse to Article 22 of DSU, without preceding the Article 21(5) of DSU.

3.1. The Objective of Article 22 of DSU

The main objective of Article 22 of DSU profoundly remarks that any measures taken according to this article should be able to bring the violating party to full implementation of a recommendation and ruling of the DSB. In other word, the measure sets out in the Article 22 predominantly to induce violating member to comply with WTO rules. Hence, Article 22 (2) of DSU notes that:

"*If the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance therewith or otherwise comply with the recommendations and rulings within the reasonable period of time determined pursuant to paragraph 3 of Article 21, such Member shall, if so requested, and no later than the expiry of the reasonable period of time, enter into negotiations with any party having invoked the dispute settlement procedures, with a view to developing mutually acceptable compensation. If no satisfactory compensation has been agreed within 20 days after the date of expiry of the reasonable period of time, any party having invoked the dispute settlement procedures may request*

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rational choice, nevertheless the EU has had every chance to implement WTO decision. In Banana Case, EU preferential treatment of former colonies and the major economic activity of country were at stake if EU reasonably prefers to comply with the decision.

[99]*Canada – Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of DSU*, (WT/DS70/AB/RW), 21-7-2000. Appellate Body held that interpretation of Article 21(5) of DSU refers to measures which have been, or which should be, adopted by the member to bring about compliance of the recommendation and rulings of the DSB.

[100]Hudec, Robert E., (2000), 'Broadening the scope of Remedies in WTO dispute Settlement', in*Improving WTO Dispute Settlement Procedures*, eds. Weiss, Friedl, &Wiers, Jochem, Cameron May Publisher – London/UK., pp. 345. See also Case Australia Automotive Leader, *Supra Note* 69. The complainant would not initiate Article 22 proceedings until the circulation of the compliance panel's report pursuant to Article 21 (5) of DSU.

authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements."

The objective of Article 22 (2) of DSU is focusing on the remedial measure which is divided into three remedial measures taken by the parties to the dispute. First measure is the removal of violations by violating party. This measure is known in the domain of public international law as cessation and non-repetition which is generally considered a foremost remedy for an internationally wrongful act.[101]

Second measure is compensation. Compensation constitutes a refund remedy where usually denotes a pecuniary concept. As it is known by public international law, compensation should be achieved in accordance to cover any financially assessable damage including loss of profit.[102] In general, compensation is the most liberal form of remedies that aims to achieve a "mutually acceptable" settlement based on the principle of "full and fair address", the assessable damage therefore should be determined by both parties to the dispute.[103] However, compensation in some cases allows the continuation of the WTO inconsistent measure, and in doing so conflicts with the objective of Article 22 of DSU.[104] For instance, in *US – Copyright Case* where the U.S. and EU mutually agreed to resolved the dispute with the U.S. paying a set amount of fund. The agreement did not require the U.S. to amend the act found to be a violation of the U.S. obligations under TRIPs Agreement. To the

[101] Article 30, Cessation and Non-Repetition The State responsibility for the internationally wrongful act is under an obligation: (a) To cease that act, if it is continuing; (b) To offer appropriate assurances and guarantees of non-repetition, if circumstances so require. Articles of Responsibility of States, *Supra Note* 83. See also Resolution of the General Assembly of the UN, A/RES/56/83, *Responsibility of States for Internationally Wrongful Acts*, adopted on Dec.12, 2001.

[102]Article of Responsibility of States, *Supra Note 83*. Article 36 (Compensation), (1) The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. (2) The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

[103]Cho, Sungjoon,(2004), 'the Nature of Remedies in International Trade Law',*the University of Pittsburgh Law Review*, Vol. 65 No. 763, pp. 5.

[104]Mercurio, Bryan, (2009), 'Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding', *World Trade Review*, Vol. 8 No. 2, United Kingdom, pp. 315-338. See also Bronckers, Marco, and Van den Broek, Naboth, (2006), "Financial Compensation in the WTO: Improving Remedies in WTO Dispute Settlement", in *Reform and Development of the WTO Dispute Settlement System, eds.* Georgiev, Dencho, and Vand der Borght, Kim , Cameron May – London/UK, pp. 43.

contrary, the relevant U.S. legislation at issue remains unchanged, meaning the compensation somehow does not always meet the objective of Article 22 of DSU.[105]

Third measure is suspension the application to the member concerned of concessions or other obligations under the covered agreements. This last measure is able to take if the parties to the dispute fail to hold the compensation measure. The suspension of concession or other obligations under the covered agreement constitutes a trade retaliation action or trade countermeasure since the injury party implies it unilaterally. This last remedy has been long remarkably recognized under public international law as restitution or a retrospective form of reparation.[106] Nevertheless, unlike restitution concept granted under public international law which takes into account past as well as expected future injury, Article 22 of DSU provides for the authorization of retaliation exclusively for the future. This means that the only concessions that may be suspended are those are equivalent to the benefits to be expected by injury party in the future because of non-compliant by another member.[107] Thus, assessing the equivalent of level nullification or impairment is a significant issue before the injury party holds retaliation against another party, because the nature of WTO trade retaliation is focusing on a restoration of the balance of reciprocity that WTO obligations represent. This is one of the issues that will be elaborated below to attain the legal concept of WTO trade retaliation, which derives from the objective of Article 22 of DSU.

3.2. The Legal Concept of Trade Retaliation in the WTO Dispute Settlement System

The word "retaliation" is a generic term for "suspension of concession or other obligations" provide in DSU Article 22 (2), and "countermeasures" under Agreement on Subsidies and Countervailing Measures (SCM Agreement).

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[105] Davies, Arwel, (2006), 'Reviewing Dispute Settlement at the World Trade Organization: A Time to Reconsider the Role/s of Compensation?' *World Trade Review*, No.5, pp.31-67.

[106] Article 35 (Restitution): A state responsible for an internationally wrongful act is under an obligation to make restitution, that is, to reestablish the situation which existed before the wrongful act was committed. Article of Responsibility of State, *Supra Note* 83.See also Case Concerning the Factory at Chorzow (Pol. V. Germany), 1928 P.C.I.J. (serv.A) No.17 (Sept.13), available at :(http://www.worldcourts.com/pcij/eng/cases/chorzow2law.htm),*last visited Jan, 12 2010*. In its merit, PCIJ noted that the essential principle contained in the actual notion of an illegal act-a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.

[107] Vazquez, Carlos M., & Jackson, John H., (2002), 'Symposium Issue on WTO Settlement Compliance: Some Reflections on Compliance with WTO Dispute Settlement Decisions', *Law & Policy International Business*No.33, pp.555.

3.2.1. The Determination of 'equivalence to the level of nullification or impairment'

One of the most controversial issues regarding trade retaliation in the WTO is the determination of appropriate level of nullification or impairment. Even though Article 22(4) of DSU provides the legal concept of "balance" between the amounts of trade retaliation and the level of nullification or impairment, parties to the dispute sometimes take unfair advantage of the violation. The target country views things from an economic (mercantilist) perspective, which tells that extra – large retaliation involves an extra-large economic gain for the retaliating country.[108] This perception is contrary to legal concept of balance itself,[109] so Article 22(6) provides standard of equivalent assessment that is spelled out by Arbitration. For example, in the *EC - Hormone case*, the level of nullification or impairment was defined by the arbitrators as being equal to the value of U.S. and Canadian exports of hormone-treated beef that would have entered the European market since the EU had withdrawn the ban on 13 May 1999 (when the reasonable period of time is expired). The estimate of the impairment suffered is therefore based on a counterfactual hypothesis and is crucially expressed as the value of trade lost due to the persistence of the wrongful act after the expiry of date.[110] Once the arbitration determines the equivalent to the level of nullification or impairment, the injury country allowed beginning imposing trade retaliation under Article 22 of DSU.

3.2.2. The Suspension of Concession to Rebalance Trade Concession

Mercurio notes that the question of whether the retaliatory phase of the process is designed to rebalance trade concession is simply not clearly addressed in the text of DSU.[111]However, opposite to Mercurio argument, Article 3(3) of DSU describes that prompt settlement (including trade retaliation under Article 22 (3) of DSU) intends to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of members. The articulation of "a proper balance between the rights and obligations of members" is also underlying in GATT objective that rights and obligations of member are to give "reciprocal and mutually advantageous arrangements directed to the

[108]Hudec, Robert, *Supra Note 100*. See also Lawrence, Robert Z., (2003), *Crimes & Punishment ?: Retaliation under the WTO*, Institute For International Economics Publisher – Washington/USA, pp. 35

[109] Article 51 (proportionally), Article of State Responsibility, *Supra Note 83*, proportionally requirement is taking into account the gravity of wrongful acts.

[110] EC – Hormone Case, *Supra Note 4*.

[111]Mercurio, Bryan, *Supra Note 104*. p.317. See also Pauwelyn, Joost, (2010), 'The Calculation and design of trade retaliation in context: What is the goal of suspending WTO Obligations?', in *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement*, eds. Bown, Chad P., and Pauwelyn, Joost , Cambridge University Press – Cambridge/UK, pp. 44-46.

substantial reduction in tariffs and other barriers to trade and to eliminate of discriminatory treatment in international commerce'.[112] It means if one member destructs reciprocal and mutually advantages derive from WTO arrangement; it abides to recompense the destruction on purpose of rebalance the trade under WTO rules.

In particular condition, imposing trade retaliation presumably is not an easy task. Even though the level of suspension of concession had equivalent with the level of nullification or impairment, the injury country sometimes considers that trade retaliation is impracticable or ineffective if it is imposed to the same sector.[113] The impracticable condition is unaffordable to rebalance trade concession which has been impeded by the violating country. Article 22(6) paragraph (b) and (c) of DSU therefore provide the possibility for injury party to seek from the DSB authorization to suspend its concession in other industrial sectors covered by the same agreement. If this measure, still, is considered of little or no effect, the country will be able to request the suspension of its obligations covered by another agreement (cross retaliation). In *Banana Case III (EU v. Ecuador)*, WTO Panel confirmed that EU had not brought its important regime into compliance with WTO rules.[114] Ecuador therefore requested the right to retaliate against EU by suspending its obligation under TRIPs.[115] In March 2000, WTO Arbitrators elaborated on the specific requirements for cross retaliation. In order to impose cross retaliation, the retaliating country must show that is impractical and ineffective to suspend obligations in the same sector or the same agreement. In the case at hand, Ecuador reasoned that suspending tariff concessions was not practicable since the overwhelming portion of EU imports are primary and investment goods so that higher tariffs on these goods increase the cost of domestic production. Since the EU was unable to show that alternative sources of supply were readily available at similar prices and without significant transaction costs, the arbitrators concluded that the EU had not shown that

[112]GATT Preamble. Available at: (http://www.wto.org/english/docs_e/legal_e/legal_e.htm), last visited January, 21, 2010.

[113]Article 22 (3) para. (a) of DSU. See also Shadikhodjaev, Sherzod, (2009), *Retaliation in the WTO Dispute Settlement System*, Kluwer Law International Publisher – the Hague/The Netherland, pp. 44-47.

[114]EC – Banana Case, *Supra Note 6*.

[115]*Ibid*, See also Subramanian, Arvind, (2003), "India as User and Creator of Intellectual Property: The Challenges Post-Doha", in *India and the WTO*, eds. Stein, Robert M.,andMattoo, Aaditya, The World Bank and Oxford University Press – Washington USA/Oxford/UK, pp. 169 – 180. The issue is whether such procedures could unduly circumscribe the use of TRIPS as retaliation when partner country infringements are goods. This depends very much on the interpretation of what is deemed effective and practicable.

suspension of tariff concessions on primary and investment goods is practicable.[116] Ecuador therefore argued that tariff increases on EU imports are also unlikely to have a significant effect since Ecuador only accounts for a small proportion of EU exports. The Arbitrators acknowledged that the retaliating country should ensure that the impact of the suspension has the result of inducing compliance. According to Article 22 (8) DSU, retaliation serves to pressure the non-compliant party to comply with DSB rulings.[117]However, for Ecuador, imposing cross retaliation was perceivable to rebalance its trade concession that had impeded by the banana regime of EU.

3.2.3. Trade Retaliation is Temporary Measure to Induce Compliance

Unlike national law, nothing in the parlance of international trade law promulgates retaliation as punishment. It simply indicates in Article 3 (7), 21 (6), and 22 (1) DSU, that trade retaliation is only a temporary measure that falls short of resolving the dispute. The DSU clearly stipulates in Article 19 that the preferred remedy is for the non-compliant party to bring its measure into conformity with the relevant covered agreement. Hence, retaliation should be withdrawn once the non-compliant party brings its measure into conformity with WTO rules. From this point of view, the retaliation serves to induce compliance[118] and should only be in place until such time.[119] The imposition of retaliation can be immediately after DSB authorized the injured party to impose suspension concession or other obligation under covered agreement. An important procedural dispute arose in *the Banana Case* between the EU and the United States over the relative primacy and sequencing of compliance. The United Stateswished to retaliate immediately while the EU argued that this could only be done if its new trade measures for bananas were found not to comply with the WTO rules.[120]

Once an injury party decide to impose retaliation, it is necessary to consider the 'good faith' of non-compliant party to further comply with WTO rules. It is understood that the

[116]*Ibid* , Banana Case, *Supra Note* 6, at para. 88 – 96

[117]*Banana Case, Supra Note 38.*

[118]*Banana case Supra Note 38*, para. 6.3. Arbitrators stated that "we agree with the United States that this temporary nature (of countermeasures) indicates that is the purpose of countermeasures to induce compliance"

[119]The Article 22(8) DSU provides "the suspension of concession or other obligations shall be temporary and shall only be applied until "such time" as the measure found to be inconsistent with a covered agreement has been removed..."

[120] Banana Case, *Supra Note* 38.

retaliation is merely aimed at putting economic and political pressure on non-compliant member to withdraw or amend the WTO- illegal measures. Nothing in the text of DSU offers a range of ways and means to punish the member country due to illegal measures that conducted in the past.

There are 4 cases lead to request to authorize retaliation and 6 cases are granted to impose retaliation.

Request to have authorization to retaliate:

1. United States v. EC, Section 110 (5) of US Copyright Act, Recourse to Article 21 (3) (c) of the DSU by the EC (WT/DS160/12) 7 January 2002.
2. United States v. Argentina, Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina, Recourse to Article 21 (5) of the DSU by Argentina, (WT/DS268/AB/RW) 21 June 2007.
3. European Communities v. U.S., Measures Affecting the Approval and Marketing of Biotech Products, (WT/DS291/R), 17 January 2008.
4. United States v. Indonesia, Measures Affecting the Production and Sale of Clove Cigarettes, (WT/DS406/AB/R) 23 August 2013.

Granting Authorization to impose retaliation

1. United States v. Australia, Brazil, Chile, EC, Indonesia, India, Japan, Continued Dumping and Subsidy Offset Act of 2000, (WT/DS217/14 and WT/DS234/22) retaliation granted in 26 November 2004.
2. European Communities v. U.S and Ecuador – Regime for the Importation, Sale and Distribution of Bananas, Recourse to Article 21 (5) of the DSU by the United State and Ecuador (WT/DS27/AB/RW/USA and ECU) 26 November 2008.
3. Canada v. Brazil, Export Credit and Loan Guarantees for Regional Aircraft, Recourse to Arbitration by Canada under Article 22 (6) of the DSU and 4 (11) of the SCM Agreement, (WT/DS222/ARB) 17 February 2003.
4. United States v. Canada and Mexico, Continued Dumping and Subsidy Offset Act of 2000 (WT/DS234/CAN and MEX) 26 November and 17 December 2004.
5. United States v. Brazil, Subsidies on Upland Cotton, Recourse to Arbitration under Article 22 of the DSU and 4 (11) SCM Agreement, (WT/DS267/ARB) 19 November 2009.
6. United States v. Antigua & Barbuda, Measures Affecting the Cross-Border Supply of Gambling and Betting Services, Recourse to Arbitration under Article 22 (6) of the DSU, (WT/DS285/ARB) 28 January 2013.

3.3. The General Implications of WTO Trade Retaliation

WTO agreements are mainly to govern international trade player in the level of state. States as member abide by WTO law to rule small scale of international trade players in their domestic level, such as exporter, importer, individual, or trade union. The trade retaliation is seemingly focused on state as international trade player, but does not touch the low level of international trade player. Accordingly, to achieve the purpose of this research, some general implications of WTO retaliation will be elaborated below

3.3.1. Implication of WTO Trade Retaliation to State as the WTO Member

The coherence factor between WTO trade retaliation and state as international trade player is depending on economic equilibrium of country itself. For some countries (known as 'big international trade player' such as EU, the U.S., Canada and Japan), WTO trade retaliation takes effect to small part of their monetary value in Gross National Income (GNI), because the implication of WTO trade retaliation is depending on the size of the economies involved, the degree of bilateral trade between the two nations to the dispute and the composition of this trade and, its relative importance.[121] For EU, the suspension of concession amounting to up USD 191.4 million per year levied by the U.S. would not detriment whole GNI per year.[122]

On the contrary, the economic implication of WTO trade retaliation would probably different when a small economic country is dependent on the defendant country as the only possible source of its exports. Horn and Mavroidis[123] also mentioned if the suspension of concession is costly; it will be more costly to the country with higher trade barriers. If in one country, the suspension reduces imports from US$600 to US$ 500 million, while in another country imports fall from US$100 to nil, and then from an economic point of view the loss to be felt more severely in the latter country. Consequently, to the extent that small economic countries (small GNI countries) have higher barriers to trade, there may be an argument to be

[121] Horn, Hendrick, and Mavroidis, Petros C.,(1999), 'Remedies in the WTO Dispute Settlement System and Developing Country Interest', Research Paper, Institute for Economic Studies, Centre for Economic Policy Research, Stockholm University – Sweden, November 14, 1999, pp. 21. See also Shanin, Magda, (2011), 'WTO Dispute Settlement for Middle-Income Developing Country: The Situation Egypt', in *Dispute Settlement at the WTO: the Developing Country Experience*, eds. Schaffer, Gregory C., and Melendez-Ortiz, Ricardo, Cambridge University Press – Cambridge/UK, pp.282-284

[122] EC – Banana case, *Supra Note 38.*

[123] Horn, Hendrick, and Mavroidis, Petros C. *Supra Note 121.*

made for why they should suffer more in welfare terms from a countermeasure or retaliation of a given size.

Coherence with argument above, Yusuggested, "An import tariff on a small country pushes up its domestic import price, which in turn leads to higher domestic production and less consumption on the importable. Without a doubt, such a small country bears a dead weight loss due to both production and consumption distortions."[124] This term therefore will aggravate domestic users, who suffer a loss of choice and probably have to pay higher prices for substitute product. Nevertheless, if a small country is retaliated, the import tariff will boost the price of exported product, which means domestic users particularly in a large country will acquire substitute product from different exporter country but less price. Furthermore, the competition among exporters from developing countries is fierce, since developing countries are typically exporting similar products.[125]

The case of *Brazil –Aircraft* between Brazil and Canada was illustrative for the effects of implementation of the WTO retaliation on a developing country. The retaliation measure was imposed since Brazil had failed to withdraw the export subsidies for regional aircraft under the PROEXpolicy. Hence, the Brazilian policy was deemed to be nullification and impairment of the benefits accruing to Canada's aircraft trade under the SCM Agreement. In 2000, following the Panel and Appellate Body decisions, Canada was allowed to impose retaliation against Brazil with respect to the suspension of the application of tariff concessions under GATT 1994, the suspension of obligation under the Agreement on Textiles and Clothing, and the Agreement on Import Licensing Procedures. Subsequently, WTO Arbitration determined the level of suspension in maximum amount of C$ 344.2 million per year.[126]

According to Canada Gazette May 13, 2000,[127] Canada would suspend the obligations under GATT 1994 by imposing 100% surtax on selected items imported from Brazil; the

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[124] Yu, Miaojie, (2007), 'Measuring the Impact of Trade Protection on Industrial Production Size', Research Paper Presented at the 2007 AEA Annual Meeting, Chicago, December 31, 2007, pp.11.

[125] *Trade Barriers Faced by Developing Countries' Exporters of Tropical and Diversification Products,* International Centre for Trade and Sustainable Development (ICTSD) and the Food and Agricultural Organization of the United Nations (FAO), FAO Trade Policy Brief No. 16, March 2008, *available at*(www.fao.org/es/esc/en/378/428/index.html.), *last visited* : 20 May 2008.

[126] *Brazil – export Financing Program for Aircraft, WT/DS46/ARB,* August, 28 2000. *In reference to report of the Appellate Body*, WTO/DS46/AB/RW, July, 21 2000, and WT/DS46/AB/R, August, 2 1999.Report of the Panel, WT/DS46/R, April, 14 1999.

[127] Canada Gazette, Department of Foreign Affair and International Trade (DFAIT), May 13 2000. Available at www.dfait.go.ca., last visited may 16, 2008.

surtax would be in addition to any existing rate of duty on these imports. The initial lists included most industrial and agricultural products. Canada also permitted the imposing of restraints on imports of textile and clothing outside the provision of Agreement on Textiles and Clothing. Additionally, Canada was allowed to suspend its obligations to Brazil under Agreement on Import Licensing. The Brazil General Preferential Tariff Treatment (GPT) would be suspended up to 100% tariff imports *ad valorem*.[128] According to Canada Custom and Revenue Agency 2001, in the Custom Tariff Schedule, Canada imposed Most Favoured Nation (MFN) Tariff to textile products about 10% - 16% per item.[129]

If Canada would impose 100% surtax on each textile items that imported from Brazil, which was practically increasing the price of every piece of clothing imported from Brazil in the Canada's market, then it would gradually exclude Brazil's textile and clothing products in the Canada's market. It was obvious that the retaliation had an adverse effect upon the Brazilian exporters. Finally, the impact of suspension of obligations would be able to decrease trade welfare to both Brazilian exporter and producers.

Another implication of WTO retaliation by increasing tariff levels is particularly troublesome for smaller developing country members who have lack of capacity in retaliating non-compliant member. As India summed up this matter in a proposal to the DSU Review mentioned that the tremendous imbalance in the trade relations between developed and developing countries places severe constraints on the ability of developing countries to exercise their rights under Article 22 of DSU. The economic cost of withdrawal of concessions in the goods sector would have a greater adverse impact on the complaining developing country Member than on the defaulting developedcountry Member and would only further deepen the imbalance in their trade relations already seriously injured by the nullification and impairment of benefits.[130] Thus, in terms of WTO retaliation, the implication of it depends on the size of trade bilateral between the country members to the dispute.

Nevertheless, WTO retaliation implies unfortunate condition to developed country as well as developing country, in particular to private economic actors. In *Banana Case*, DSB determined that the EU import regime for bananas violated WTO non-discrimination principle. In 1999, DSB authorized the U.S. to suspend tariff concessions up to US$ 191.4

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[128]Canada Department Foreign and International Trade (DFAIT), Export – Import Control Bureau, 2001 – 2002.

[129]*Ibid*

[130]TN/DS/W/19, at 1, see also Steinberg, Richard, (2002), 'in the Shadow of Law or Power?: Consensus-Based Bargaining and Outcomes in the GATT/WTO', *International Organization Journal*No. 56, pp. 339-374.

million per year in imports of EU products in attributable to non-compliant of EU to Panel and Appellate rulings and recommendation.[131] The U.S. levied 100% *ad valorem* customs duties on imports of various EU – origin goods, such as batteries, bed linen, paper boxes, spectacles cases and bath products.[132]This prohibitive tariff is consequently damaging trade benefits of certain EU industries, which do not have been benefiting from the EU Banana regime.

3.3.2. Implication of WTO Trade Retaliation to Private Economic Actors

According to the explanation above, WTO retaliation is more inflicting private economic actors within the countries to the dispute, since the private economic actors are the predominant player of international trade. WTO retaliatory measures do not benefit the injury member but instead damage the innocent such as private economic actors, because from the economic point of view, trade retaliation is inefficient for both the country imposing the retaliatory measures as well as for the target nation.[133]

From the perspective of importing country – importers are facing troublesome in adjusting the level of tariff, due to the application of - for example- 100% tariff *ad valorem*. Importer is holding obligations to pay more for the importing goods. Economically, higher tariff will be presumably affecting the price of goods in the market, thus in the end of trading circumstance, the consumer will pay higher price than normal leverage. In addition, the high tariff will inflict the cost of production if the goods are raw material. For example, imposing 100 % tariff on the spare part of automotive will boost the cost of production of vehicles for producers.

The fact that trade retaliation causes harm to businesses or consumers in the country imposing trade retaliation (importing country) becomes polemic. For example, the major critics happened when the U.S. has proposed to impose a 100 percent tariff on all European motorcycles and scooters under 500cc engine displacement as part of retaliation for the EU's ongoing import ban on U.S. beef from cattle that have been treated with growth hormones, because EU officially have not lifted the 20 years old ban despite a WTO order to end it. Arbitrator therefore decided to allow the U.S. to impose US$116.8 million on import duties to more than 100 European goods. One of the hit lists are motorcycles imported from EU.

[131]Banana case, *Supra Note* 38.

[132]*Ibid*

[133] See Pawelyn, Joost, *Supra Note 111*.

American automotive industries therefore urge the U.S. Government to consider the negative effect of imposing high tariff in this industry, because the majority of motorcycles and scooters under 500cc are sold through local dealerships. Collectively, these dealerships contribute to the employment of a substantial number of Americans working in sales, services, parts and general operations. Imposing 100% tariff on importation of these motorcycles and scooters will eventually spread the negative effect from dealer to consumer,[134] because higher tariffs are intendedto increase the cost of targeted items to consumers and, thus, lead to declining purchases.

If the WTO retaliation is a blunt instrument for importers in retaliating country then it is also blatant measure for exporter in non-compliant country. It can be viewed after the U.S. won Banana Case with EU. The U.S retaliated EU by implying 100% tariff to several EU Companies which is causing loss of trade benefit for those companies from April 1999 to June 2001. This situation also happened to the U.S. when EU won its challenge before the WTO regarding *the US – FSC/ETI case*.[135] On March 2004, the DSB authorized EU to imply retaliatory tariffs against the U.S. exports. EU proposed list of goods which are subject to a 100% tariff. The list tilts heavily towards a large number of products that seemingly could be made just about anywhere in the U.S., such as the precious stones and jewelry, machinery and mechanical appliances, wood and paper articles, leather and leather articles, and toys and sport equipment.[136] The effect of raising exports duties could cause most producers of the targeted products withered away after a short period of time. Furthermore, market distortion and unemployment tends to be a dilemmatic result of WTO retaliation.

At every point in WTO retaliation, it fails to consider how imposing of high tariff will hurt innocent victims in both importing and exporting country, as Charnovitz mentioned that WTO has no requirement that the sanctioning government provide help to private economic actors who bears the damage of retaliation. Indeed, the DSU itself completely ignores the burden of any duties collected from exporters and importers within countries to the dispute.[137]

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[134]Federal Government Proposes 100% Tariff on European Motorcycles Under 500cc, *available at*: (http://www. Automotive.com), *last visited* 15-5-2009.

[135]*United States — Tax Treatment for "Foreign Sales Corporations," Recourse to Article 21.5 of DSU by the European Communities*, *WT/DS108/RW*, Report of the Panel, para. 3.1(a)-(b), August 20, 2001.

[136] Ahearn, Raymon J.,(2005)'European Trade Retaliation: The FSC-ETI Case', *CSR – Report for Congress*, February, 11, 2005, pp. 2.

[137]Charnovitz, Steve, (2001), 'Rethinking WTO Trade Sanction', *American Journal of International Law*,October 2001,pp. 18

In general, the WTO retaliation also contradicts with *raison d'etre* of WTO objective since the retaliation mostly implies as trade barrier.[138] The WTO objective based on the principle that the expansion of trade through reduced barriers leads to economic growth, trade development, and poverty reduction, but the retaliation of the imposing of higher trade barriers in attempt to remedy another member transgression seems contradictory. In this regard, retaliatory measure could have the effect of limiting or reducing economic growth and trade development in domestic equilibrium. The most controversy argument is trade retaliation seemingly against poverty reduction, since higher tariff could be perceived as cause of losing job in several industries.[139]

It is simply argued by the creator of DSU that the implications of WTO retaliation will urge the companies and workers hurts by declining sales, in turn, could be expected to lobby their governments to change policy to conform with WTO rules. But in fact, it is not an easy task to change domestic policy. Some policies are hardly to remove or to amend because of political influence, as the EU remains implies banana policy for years after the condemnation by the WTO Adjudication Bodies.

This research objectively inquiries the implications of WTO retaliation to private economic actors within non-compliant country member by using the U.S. and EU as subject of research. The preliminary hypothesis is the implication of WTO retaliation is harmful to private economic actors while they are subject to rules implied by their governments. Thus, state should therefore endorse a feasible system to ensure its citizen to obtain redress when their rights are infringed by the disobedience of its government to WTO rules. From this point of view, state liability principle may be viewed as an important remedy for private economic actors whose seek compensation. To this regard, compensation may be viewed as recompense of private right according to the objective of WTO.

[138] *Ibid*

[139] See Federal Government Proposes 100% Tariff on European Motorcycles Under 500cc, *Supra Note* 137. The head of AMA calculated, if US impose 1OO% tariff in European motorcycles, it will spell the end of about 400 US motorcycle and scooter dealerships, and put their employees out in the street. Then it causes poverty among them.

CHAPTER II

PRIVATE ECONOMIC ACTORS IN THE WTO LAW

1. Defining Private Economic Actor toward the WTO

The question about private economic actors in the WTO was absent from the Marrakesh Agreement, since the focus of WTO is not on the individual trader, but rather on the meshing of governmental trade policies in to beneficial of global trade.[140] But then another question arises, what is the correlation between private economic actors and WTO? How to define private economic actor toward the WTO? For the purpose of analysis about private economic actors, the argument begins with the economic activity in one state, [141]where economic activity in one state may be defined into two parts. First, there are those areas which the state is directly acting as economic actors. Second, in the field of economic activity, state is merely influencing the economic process through policies which are directly or indirectly addressed to non-state economic actors or private economic actors.[142]

1.1. State is Acting as Economic Actor

An economic actor is basically defined as individual who is acting as producers, sellers, consumers, workers, investors, exporters and importers (in economic theory they are known

[140]Charnovitz, Steve,(2001), 'the WTO and the Rights of Individual', *Journal of Intereconomics*, Vol. March/April, pp. 1. See also Kong, Qinjiang, (2002), *China and the World Trade Organization: a Legal Perspective*, World Scientific Publishing – London/UK, pp. 100. The WTO Agreement is similar to any common international treaties which are designed to create rights and obligations between the contracting parties, but the WTO Agreement leave room for private parties to enforce their rights under the agreement. It is merely up to member to enforce it domestically. See also Schaffer, Gregory, (2007), 'Public and Private Partnerships in WTO Dispute Settlement: the US and EU Experience', in *The WTO in the Twenty-First Century: Dispute Settlement, Negotiations and Regionalism in Asia*, eds. Taniguchi, Yasuhei, Yanovich, Alan, and Bohanes, Jan, Cambridge University Press – Cambridge/UK, pp.149. Schaffer mention that the reaction of private parties regarding the existence of WTO agreements in opposition or support of WTO system and its legal verdict are indicating that WTO law is relevance to states and their constituents.

[141]Economic activity is the production and distribution of goods and services. Economic Activity is also correlated with employment. If unemployment increases than the demand for goods and services decrease, however, if it decreases than on the other hand we have a higher demand for goods and services. The definition of economy activity is adopted by the Thirteenth International Conference of Labor Statisticians and set by the 1993 United Nations System of National Accounts, the threshold for classifying a person as employed is spending at least one hour during the period in the production of goods and services. Economy activity covers all market production and certain type of non-market production. *See* the World Bank, (2008), *World Development Indicators*, The World Bank Publications-Washington/USA.

[142]Pierson, Christopher,(2004), *The Modern State*, Routledge – NY/USA, pp.80.

as economic agents).[143] In a general legal framework, legal definition of economic actor has moved beyond a simple barter system to more global economic system. The basic legal definition of economic actor is a person (legal entity)[144], who is holding the object of economic activity (proprietorship)[145], then become broader with the concept of partnership (joint ownership).[146] But this general legal system is of course established by the ruling of government, which is itself an important economic actor. Accordingly, state who is acting as economic actor will be addressed before explaining non state economic actors. The explanation is divided into two different economic systems, the non-market economy country[147] and market economy country systems[148].

1.1.1. Non Market Economy Country

In a non-market economy country, state is acting totally as economic actor where the government seeks to determine economic activity largely through a mechanism of central planning. The production targets, prices, costs, investment allocations, raw materials, labor, international trade and most other economic aggregates are manipulated within a national economic plan drawn up by a central planning authority. Hence the public sector makes the

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[143] Wilber, Charles K., (2003), 'Ethics and Economic Actors',*Post-Autistic-Economic Review*, Issues no.21, Article No.3, 13 September 2003. *See also*Love, Patrick, and Lattimore, Ralph, (2009), *International Trade: Free, Fair and Open?*, OECD INSIGHTS-Denvers/USA, pp.170. These authors mentioned the role of economic actors in economic activity, i.e; international trade. International trade gives an important benefit to develop economic growth of economic actors.

[144]See Marsh, S.B., and Soulsby, J., (2002), *Business Law: Eight Edition*, Nelson Thomas Ltd – Edinburgh/UK, pp. 54. Legal entity is anything recognized by law as having legal right and duties, it is simply a person in the ordinary sense but the person who has legal capacity.

[145]See the ancient definition of proprietorship according to the Circuit Court of the United States for the Eastern District of Pennsylvania – In Equity, 'in the case of Laura Keene vs. Wheatley & Clarke'. See *The American Law Register Vol. IX*, (1861), eds. Fish, Asa I., and Wharton, Henry, D.B. Canfield & Co. Goldsmiths Hall, Library Street – USA, pp.61. Proprietorship is a certain or contingent exclusive rights of unlimited or limited profitable use of an ascertainable subject, corporeal or incorporeal. Proprietorship thus is defined as compounded of the proprietor beneficial rights, and his rights of excluding other persons from the use or profit.

[146]Rosenberg R.R., and Ott, W. G.,(1977),*College business law*, Shaum's Outline Series, McGraw-Hill, New York/USA, pp. 61

[147]Nove, Alec, (1987), 'Planned Economy', *the New Palgrave: A Dictionary of Economics*, vol. 3,Stockton Press – NY/USA. pp. 879-880. Non market economy is also known as planned economy which is an economic system when the state manages the economy. The central government makes all decisions on the production and consumption of goods and services. States also employs "influence, subsidies, grants and taxes but does not compel". In the planned economy country may consist of state owned enterprises and private enterprises directed by the state.

[148]Altvater, E.,(1993). *The Future of the Market: An Essay on the Regulation of Money and Nature after the Collapse of "Actually Existing Socialism"*, Verso Books – London/UK, pp. 237–238. A market economy is economy based on the division of labor in which the prices of goods and services are determined in a free price system set by supply and demand.

major decisions affecting demand and supply within the national economy.[149] However, since GATT was designed by market economy for market economy countries, there is not a standard criterion for the market versus non market economy distinction,[150] except for non-market economy country; WTO Members explicitly recognize that it needs to be treated differently than market economy countries in antidumping case.[151]

Perhaps most tangible factor for state as economic actors in the non-economy market system is when state itself is holding almost all object of economy activity. State can be acting as owner and producers, sellers and policy maker. In the state-socialist societies of East Central Europe and former Soviet Union, state ownership was the preponderant form of ownership within the formal economy. Disposing of these state assets in ways which are fair, efficient and lawful has been acutely problematic.[152] Furthermore, in this economic system, government can control foreign trading and entrepreneurship based on the centrally planned, where the implementation of economic freedom concept is decreasing.[153] It seems contrary to the basic principle of WTO which the WTO Agreements and its trade systems are milestones

[149]S. Wang, (1996), 'the US Trade Laws concerning Nonmarket Economics Revisited for Fairness and Consistency', *Emory International Law Review*, Vol. 10, No. 2, pp. 593 – 616. Wang argues that in a non-market economy concept, the invasive control and planning of the government in the market place which distinguishes a market from a non-market economy. The key features in a non-market economy, as the term implies, are the absence of a market system under which prices are determined by market supply and demand and the failure of the level of production to correspond with market demands. In a non-market economy, the quintessential market decisions, such as production, supply and price are determined centrally by the government. *See also*Comptroller General, Report to the Congress:*theUS Laws and Regulations Applicable to Imports from Non Market Economies Could Be Improved 2*, (1981), SU. Doc.GA. 1.13: 1D-81-35, pp. 8-26. The U.S. trade law defined non market economy by the characteristic of: 1) planned resources application, 2) administratively established domestic prices, and 3) non-convertible currency.

[150]Polouektov, Alexander, (2002), *'The Non-Market Economy' Issue in International Trade: In the Context of WTO Accessions*, United Nations Conference on Trade and Development, UNCTAD/DITC/TNCD/MISC.20, 30 June 2002,UNCTAD- Geneva/Switzerland, pp. 7-37.

[151]Within the WTO framework, the non-economy market issue has its roots in paragraph 1 of Anti -Dumping Agreement, Article VI of GATT 1994.

[152]Frydman, A. RapacyznskiFrydman and Earle, J., (1993), *The Privatization Process in Central Europe, London and Budapest*, Central European University Press – Budapest/Hungary, pp. 276.

[153]*See* Friedman, Milton, and Friendman, Rose,(1990), *Free to Choose: A personal Statement – A Classic Inquiry into the Relationship between Freedom and Economics*, A Harvest Book (Harcourt Inc.) – Orlando/USA, pp.2-30. Friedman concept of economic freedom is simply a requisite for political freedom, by enabling people to cooperate with one another without coercion or central direction it reduces the area over which political power is exercised. *See also*Gwartney, James, and Lawson, Robert, (2004), *Economic Freedom of the World, 2004 Annual Report*, The Fraser Institute – Vancouver/Canada, pp. 5. In this report, economic freedom requires governments to refrain from actions that interferes personal choice, voluntary exchange and the freedom to enter and compete labor and product markets. Economic freedom is reduced when taxes, government expenditures and regulations are substituted for personal choice, voluntary exchange, and market coordination. Restriction that limits entry into occupations and business activities also retard economic freedom.

on the long and winding road worldwide economic freedom, consumer welfare and democratic peace.[154] Hence, the explanation of non-market economy country will be excluded in this research, since the WTO is more focus on state as economic actor in a market economy system.[155]

1.1.2. Market Economy Country

Contrary to the non-market economy country, in a market economy country, state is acting as an economic actor in a limited area such a state as owner-producer in State Owned Enterprises (SOEs).[156] State is mostly acting as economic policy maker which is influenced by the impact of globalization.[157] The impact of globalization is principally concerned to the private ownership that is always remained the predominant forms. The state ownership thus tends to be strongly focused upon the public utilities, that is providing basic services which is essential to everyone,[158] but in the context of globalization, state is possible to devolve its

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[154]Petersman,Ernst-Urlich,(1997), *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement*, Kluwer Law International – the Hague/ Netherland, pp.4.

[155] Finger, J. Michael, and Winters, L. Alan,(2002), 'Reciprocity in the WTO', in *Development, Trade and the WTO: A Handbook*, eds. Hoekman, Bernard, Mattoo, Aaditya, and English, Philip, The World Bank – Washington/USA, pp. 67. Although there is no explicit requirement in WTO Agreements that a member have a market economy system, the effect of term non-market economy has become a non-tariff barrier in international trade, since trading practice in non-economic country were fully controlled by state enterprises or ministers, and prices were fixed by state. *See also*Palmeter, David, (1998), 'The WTO Antidumping Agreement and The Economy in Transition', in *State Trading in the Twenty-first Century*, eds. Cottier, Thomas, and Mavroidis, Petros C., University of Michigan Press – Ann Arbor/USA, pp. 115 -120.

[156]State Owned Enterprises(SOEs) are used to denote state as economy actor in non-market economy country, however in some market economy or transition economy countries, SOE is still exist, for example in OECD country. See Secretary General of OECD OECD,(2005), *Corporate Governance of State Owned Enterprises: A Survey of OECD Countries*, OECD Publications – Paris/French, pp. 23. Even after the privatization wave, the direct role of the state in the economy has not lost its relevance. There is still a number of SOEs in many OECD countries and the sector is remarkable for its size, economy impact, and for strategic sectors in which it operates.

[157]Delbrück, Jost, (1993), 'Globalization of Law, Politics, and Markets-- Implications for Domestic Law--A European Perspective', Indiana JournalGlobal Legal Studies Vol. 1, pp. 1-9.*see also*Dicken, Peter, (1998), 'Global Shift: The Internalization of Economic Activity', *Indiana Journal Global Legal Studies* Vol. 1, No. 4 , pp. 1-40, these authors are analyzing the process of globalization resulting from the interactions between states and corporations. *Seealso*Amman, Afred C., (2002), 'Globalization, Democracy, and the Need for A New Administrative Law', *UCLA Law Review*, August 2002, pp.4. For the context of this research, Globalization draws states and non-state entities into a range of partnerships and hybrid forms of governance that push and pull the "national interest" across national lines, and compress the national interest with economic interests. By delegating public functions to private entities, governmental units become more and more like private firms competing in a global marketplace.

[158] Pierson, Christopher, *Supra Note 142*, pp. 81. A public utility is an organization that maintains the infrastructure for a public service. It is subject to forms of public control and regulation ranging from local community-based groups to state-wide government monopolies. The term utilities can also refer to the set of services provided by these organizations consumes by the public such as electricity, natural gas, water and telephone services.

activity into independent body. The economy activity in market economy country tends to de-centralize the state, along with the existence of private ownership as a non-state economic actor which constitutes as major role in economic equilibrium. In this part, state as economic policy maker is taking more predominant position rather than owner-producer.

1.2. State as Economic Policy Maker

In the economic activity within a country, government is acting as economic regulator and policy maker. Economic regulation is an important instrument for government policy in market economy. Some forms of regulations are concerned with setting a framework of rules for people to follow in their dealing with each other.[159] The regulation applies to all market participants[160] and it would be defended as a mean of making the market process more efficient over the long term.[161] This economic regulation derives from economic policy of each country where such policies are often influenced by international institution like the International Monetary Fund or the World Bank.

In the globalization era, the economy activity of state is indispensable to the international economic relations. Government increasingly finds difficulties to implement commendable policies regarding economic activity because such activity often crosses the borders in ways that escape the reach of much of national government control.[162]Responding to these difficulties, states have created a number of international organizations with competences in the field of economic relations.[163] Hence states are embarking their economy policies in harmony with international economic agreements, such as UN Treaty family of international economic relations.[164] Even if nearly all of these international economic

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[159] See Keenan, Denis, and Riches, Sarah, (2007), *Business Law Edition 7*, Edinburgh Gate – London/UK, pp. 15-19.

[160] Market participants are buyers, sellers and government. See *The OECD Report on Regulatory Reform, Volume I: Sectorial Studies*, 1997, OECD Publishing – Paris/French.

[161]Rickettss, Martin, (2006), 'Economic Regulations: Principles, History and Methods', in *International Handbook on Economic Regulation*, eds. Crew, Michael, and Parker, David, Edward Elgar Publishing – Glos/UK, pp.34

[162] Jackson, John H.,(1997), *The World Trading System: Law and Policy of International Economic Law (second Edition)*, Massachusetts Institutes of Technology Press – Massachusetts/USA., pp.1

[163]Kubiszewski, K.S., (1983), *International Legislation*, in: 5 EPIL, pp. 97.

[164]Kunig, Philip, Lau, Niels, and Meng, Werner,(1993), *International Economic Law: Basic Documents*, Walter de Gruyter& Co – Germany, pp. 3-823. International Economic Law in this book is divided in to economic international and regional cooperation and regulation of the international economy. See also Ozmanczyk, Edmund Jan, (2003), *Encyclopedia of the United Nations and International Agreements: Third Edition, Vol. 1 A-F*,ed. Mango, Anthono, Routledge Publishing - New York/USA, pp. 809-886.

agreements lack a binding character, they influence national economic policies and thereby indirectly impinge upon private participants in international economic relations.[165]

From this point of view, there are two levels subject involve in international economic relations. First, an interstate or organization-state level covering the relationships among the traditional subject of international law; and second, a level of nationals (individual and legal persons) belongs to different state. The interstate level deals with co-ordination of economic policies, elaboration of guidelines and mechanism for international economic co-operation. Meanwhile, direct economic interactions on production and exchange of goods are executed at the level nationals by private economic actors.[166] Accordingly state is directly applying international economic agreements which are concern to regulate all market participants including non-state economic actor or private economic actor.

This research is usingterm of 'private economic actor', to distinguish between state own enterprise and non-state own enterprise. State own enterprise is an economic actor which predominantly exists in non-market economy system, but non-state own enterprise (private economic actor) exists due to influence of economic system in market economy country. Although in the market economy system state sometimes is acting as economic actor, but the form and policy is dissimilar to the concept of it in non-market economy system. State in market economy system is generally maintaining public utilities (it is known as public economic actor).

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[165]Kunig, Philip, Lau, Niels, and Meng, Werner, *ibid*, pp. XIII. Although lack of binding character, the international economic agreements are upheld to be law when state is voluntarily adopting them into its national legislation. Hence it is quiet evidence that international economic relations as a whole cannot be regulated in isolation by either international economic law or municipal law. *See*Voitovich, Sergei A., (1995), *International Economic Organizations in the International Legal Process*, MartinusNijhoff Publishers – Leiden/Netherlands, pp.4.

[166]Voitovich, Sergei A., *ibid*.*Seealso*MacDonald, Kate, and Woolcock, Stephen, (2007), 'Non-State Actors in Economic Diplomacy', in *The New Economic Diplomacy: Decision Making and Negotiation in International economic Relations (Second Edition)*, eds. Bayne, Nicholas, and Woolcock, Stephen ,Ashgate Publishing Co – Farnham/UK, pp. 78. To complete Voitovich argument, private economic actors also have a crucial position in playing the role of economic diplomacy. At national level these actors are engaging with state decision-making processes. It is partly following the new development of domestic economic policy. At international level, these private economic actors are still holding the traditional strategic in which lobbying state actors nationally in the hope that their preferred positions will be incorporated within the definition of 'national interest' and taken forward into international fore. But these days, private economic actors mobilize beyond national border to leverage direct pressure on decision makers at the international level.

1.3. Private Economic Actors[167]

As mention in previous sub section above, the predominant economic actors within a state are private economic actors. In the context of international economic relations, private economic actors are also holding an important part. As Ostrihansky posited "it is not government, but enterprises and individual who make most economic decisions."[168] From this argument, it is comprehensible if private economic actors are holding an important role in economic environment; moreover, these legal entities for some reasons are affecting government economic policy both at the level of national and international. However, this chapter does not give enlighten the existence of private economic actors in political dimensions where private economic actors are holding adequate position in lobbying state in promulgating economic policy[169], although in the chapter IV, the political relation between the U.S. Congress and their economic constitution in regard with implication of WTO retaliation will be discussed briefly. This chapter is more about general legal framework on relation between state and its private economic actors. This relation is leading to the sustained economic growth in every country where most private economic actors rely upon national law of credible commitments to them. If private economy actors are conducting their activities they require assurances of their rights despite their obligations.[170] Governments play a critical role in securing these collecting goods by providing them directly a stable coalition between law and its enforcement.

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[167] The term private economic actors are regulated differently in some countries. In this research, term of private economic actors is defined as exporter, importer, producer, seller or buyer, investor, financing institutions (bank), service provider (telecommunications operator or other service), in the form of Business Corporation, trade enterprise (company or firms), small medium enterprise or multinational company, those who pursue their self-interest. These private economic actors are different with Government-Owned Corporation (State Owned Enterprises) or Non Profit Corporation who gains profit in a secondary goal or does not pursue any interest or profit. See Pride, William J., Hughes, Robert J., and Kapoor, Jack R., (2008), *Business (tenth edition)*, South-Western Cengage Learning – Ohio/USA.,pp.11

[168]Ostrihansky, R. (1991), 'Settlement of Interstate Trade Disputes – The Role of Law and Legal Procedures', in *Netherland Year Book of International Law*, Vol. 22, December 1991, T.M.C Asser Institute-The Hague/Netherland, pp. 174-175.

[169] See MacDonald, Kate, and Woolcock, Stephen, *SupraNote* 166.

[170]These rights include rule of law or i.e. property rights and effectiveness of contract.For this argument, *see*Williamson, Oliver, (1985), *the Economic Institutions of Capitalism*, Free Press – NY/USA., p. 15-38. See Also North, Douglass, and Weingast, Barry, (1989), 'Constitution and Commitment: the Evolution of Institution Governing Public Choice in Seventeenth Century England', *Journal of Economic History*, Vol.49, no.4, pp.803. *See also* Keefer, Phillip,(2004), 'A Review of the Political Economy of Governance: from Property Right to Voice', *World Bank Policy Research Working Paper* No.3315, pp. 2-43.

1.3.1. Private Economic Actor at National Law Level

At the level of national law, the form of regulations bases on the right and obligations of private economic actors in the array of national law which derives from its constitution.A pertinent argument in explicating the existence of private economic actors are deliberately relating to economic right in every constitution of state. Constitutions in most country are the law of making.

In this sub section, this research involves two different countries to elaborate the private economic actor at national law level. These countries are the U.S. and the EU. The argument emphasize certain salient explicates in this sub section which is pertaining merely to private economic actors and their rights within the constitution and national law subject to them, without putting aside the legal system adopted among these countries.[171] Moreover, the intentions of giving argument regarding the right of private economic actor will consequently coherence with the next argument pertinent to state liability as the predominant inquiry of this research.

1.3.1.1. The United States of America

Even though the Constitution of America does not specifically mention private economic actors (Business Corporation)[172], the nineteenth century lawyers argued that business corporation should be considered as citizen or person for applications of any rights derive from various constitutional provisions.[173] Perhaps this argument can be traced back to the earliest case identified business corporation as person. In *the case of Santa Clara Country*

[171]The American legal system is often referred to as being in the common law tradition. The fact is that the Anglo American system is a combination of judge made law and legislature made law. Both types of law making bodies are regarded as legitimate norms and creators and interpreters. *See* Malone, Albert P., and Karnes, Allan, (2008), *the American Legal System: Perspective, Politics, Processes and Policies (Second Edition)*, Rowman& Littlefield Publishers – Maryland/USA, pp. 5. Dissimilar to the U.S. (as a country), the EU operates through a hybrid system of supranationalism and intergoverntalism. The EU legal system (also known as Community legal system) is based on several sources of law. The EU law is not universal; its competence is limited to the power attributed to the Union by the legal texts adopted by the Member States. General principles of law which are recognized and applied by the member states have been used by the ECJ to underpin the Community Legal System. *See*Horspool, Margot, &Humpreys, Mathew, (2006), *European Union Law*, Oxford University Press – Oxford/UK., pp. 69.

[172] Mayer, Carl J., (1990), 'Personalizing the Impersonal: Corporation and the Bill of Rights', *Hastings Law Journal* (March 1990), pp. 557 -667. Mayer mentioned the term of "corporation" includes both public and private corporations. It is concerned particularly with the large, publicly held corporation of the kind that dominates the American economy.

[173]See Hurst, J. W., (1970), *The Legitimacy of the Business Corporation in the Law of the United States in 1780-1780*, The University Press of Virginia – Virginia/USA, p. 14-40. The most corporations were chartered by the state legislatures for specific purposes, including banks, canal companies, and trading companies.

v. Southern Pacific Railroad[174], the U.S. Supreme Court decided that a business corporation is a person and entitled to the legal rights and protections of the U.S. Constitution that afford to any person. Because the U.S. Constitution does not mention of corporations, it is a fairly clear case of the Court was taking it upon itself to rewrite the constitution.[175] After long road of jurisprudence in America, some constitutional protections apply to business corporations, and enjoy many of the same rights and privileges as natural person do.[176] The private economic actors enjoy protection from government's intrusion. These protections derive from bill of rights,[177] and it involves the corporation rights to sue or be sued.[178]

From this point of view, the law governing the rights of private economic actors in the U.S. began with somejurisprudence delineated by the U.S. Court. Coherence with it, the rights and obligations of private economic actors set out in their domestic commercial law. For example, the commercial law regulates private economic actors in many areas of commercial activities, such as contract law; corporate law, consumer protection law.[179]

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[174]*Santa Clara County v. Southern Pac. R. Co*., 118 U.S 394 (1886) filled May 10, 1886, *available at:* http://laws.findlaw.com/us/118/394.html**,***last visited* March 25, 2010**.**

[175]Hartmann, Thom, (2010), *Unequal Protection: How Corporations become people and How can you fight back?*,Berret-Koehler Publishers, Inc.-CA/USA, pp. 29.

[176] Miller, Roger LeRoy, and Jentz, Gaylord A., (2010), *Fundamentals of Business Law and Summarized Cases, 8th Edition*, South-Western Cengage Learning – Ohio/USA, pp. 12. See also The US Supreme Court has examined whether corporations are *citizens* under the following provisions: article III diversity jurisdiction, see *Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 91 (1809),* in this case jurisdiction determined by the 'real persons' (shareholders) coming to the court under the corporate name.

[177]See The Supreme Court first conferred Bill of Rights protections on corporations in *Noble v. Union River Logging R.R., 147 U.S. 165 (1893)* (fifth amendment due process rights). Although the Court conferred fourth amendment protections on corporations in *Hale v. Henkel, 201 U.S. 43 (1906)*, the Court limited these rights in *United States v. Morton Salt Co., 338 U.S. 632 (1950)*.Today, the business corporation have panoply of Bill of Rights protections: first amendment guarantees of political speech, commercial speech, and negative free speech rights: fourth amendment safeguards against unreasonable regulatory searches; Fifth Amendment double jeopardy and liberty rights; and sixth and seventh amendment entitlements to trial by jury.

[178]In parlance of Fourteenth Amendment, the US Supreme Courts recognize 'due process clause' in the case of *Minneapolis & S.L.R Co. V. Beckwith, 129 U.S. 26 (1889),* corporations are persons for purposes of the due process clause.See also *Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed 937 (1905),* this case is emanating the rise of economic due process in the U.S. the essence of this case was when business were threatened with a stifling law, the courts used the due process clauses of the Fifth and Fourteenth Amendments to declare that law is arbitrary and unreasonable.

[179]Gano, Darwin Curtis, and Williams, Samuel Collin, (2008), *Commercial Law*, BiblioBazaarLLC – South Carolina/the U.S.A., pp. 10. Commercial law is a branch of the civil law, and includes the laws regulating the rights and relations of persons engaged in trade or commercial pursuits, as the law of contracts, of partnerships or of agency.

1.3.1.2. The European Union

Unlike the U.S., the Treaty instituting of the European Union explicitly mentioned private economic actors[180] (business enterprises and individual) are granted beneficiaries from the four fundamental freedoms of free movement of goods, persons, services and capital.[181] The supranational system set by the EU treaty is also recognized private economic actors or individual as subject of EU Law. It can be traced back to the origin of the Court decision in *the case of Van Gend en Loos v. NederlandseAdministratie der Belastingen*[182]in which the Court stated that the EC Treaty (today Treaty Functioning of European Union hereinafter TFEU) had created a new legal order.[183]The main feature of the supranational integration is to achieve political integration through economic integration[184] which is in supporting economic integration process. The subject of this new legal order is not only the Member States but also their nationals.[185]Vranes thus opined that "the Van Gen and Costa/Enel cases landmarks

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[180] The term of 'company' is the expression commonly used in Article 54 TFEU *Available at: (*http://eurlex.europa.eu) *last visited* March, 15 2010, 20:07 pm. *See also*Zaphiriou, G.A., (1970), *European Business Law*, London Sweet & Maxwell – London, pp. 18. Zaphiriou mentioned that according to EEC Treaty (Rome Treaty 1957), EEC recognized enterprise as subject of community law.

[181]See *case 240/83 Procurer de la République v ABDHU* (1985) ECR 520, 531, refer to this case, the Court stated 'It should be borne in mind that the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right. *See also*Scout, Sionaidh Douglas, (2002), *Constitutional Law of European Union*, Pearson Education Limited – UK, pp.435.

[182]See Case 26/62 *Van Gend& Loos v. NederlandseAdministratie der Belastingen*(1963) ECR 1.See also case 6/64 *Costa v. Enel* (1964) ECR 585 at 593. See also Craig, Paul P., and de Burca, Gràinne, (2008), *EU Law Text, Cases and Materials: Fourth Edition*, Oxford University Press – Oxford/UK, pp. 273. Van Gend Loos was a ground-breaking judgment. This is an emerging concept of direct effect of Treaty Provision which is understood as the immediate enforceability by individual applicants of those provisions in National Court. *See also*Raitio,Juha, (2003), *The Principle of Legal Certainty in EC Law*, Kluwer Academic Publishing – the Hague/Netherland, pp. 348, *see also* Chalmers, Damian, Hadjiemmanuil,Christos,Monti, Giorgio and Tomkins, Adam, (2007), *European Union Law*, Cambridge University Press- Cambridge/UK, pp. 47.

[183] See Engle, Eric, (2009), 'Constitutive Cases: Marbury v. Madison Meets Van Gend Loos', *Hanse Law Review*, Vol.5, pp. 33 – 46. In this article Engle refer to case of Van Gend Loos that the court in Van Gend at once declared, a) that individuals have rights under the treaty, b) that those rights are enforceable against the Member States, c) that those rights may be express or implied, d) that Member States created a new international legal person, unique in international law, e) that the Member States had transferred their sovereignty in limited fields to the new international legal person, f) that the addresses of this new legal person are not merely the member states or even the individuals but also the people of the Member States.

[184]See Daniel, Andrea, (2009), *Is Economic Integration the Motor of all European Integration? The Debate Surrounding the Service Directive: Essay*, GRIN Verlag-Munchen/Germany, pp. 3. See also Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006, on services inthe internal Market.

[185]See Llorens, AlbertinaAlbors, (1996), *Private Parties in European Community Law: Challenging Community Measures*, Clarendon Press – Oxford/UK, pp. 1.

are commonly regarded as two of the essential starting points of the 'transformation of Europe', which has correctly been characterized as a dynamic quasi-automatic process."[186]

Due to the judgment of *Van Gen and Costa/Enelcase*, individuals and private economic actors have been empowered to assert their rights, in any national court, *vis a vis* their state of origin and other EU member states, which are then bound not to apply domestic law in situations where this law is in conflict with EU primary and secondary law. Private economic actors thus are granted rights to seek assistance of the courts in order to oblige the member state to respect the Treaty obligations.[187] These rights is subsequently interpreted by the ECJ which is granting individual and/or private economic actors rights to invoke directly clear EU provisions before national courts and get a proper remedy if their rights have been violated.[188] Furtherance, the EU Treaty also granted private economic actors and individual direct access to EU Courts (General Court and ECJ) to challenge the legality of decision made by the Commission and the Council of EU. This possibility has been extended to decisions adopted by European Parliament and to decision of the European Central Bank.[189]

It seem to be clear that since EU Law can penetrate and directly affect the sphere of interest of EU nationals, the law itself should be providing an adequate means for private economic actors to plea a illegality and also the action for a failure to act of their governments and any EU institutions.[190]Furthermore, private economic actors may recourse to a very specific means in an action for damage caused by disobedience of EU Treaty.[191] Besides any

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[186]Vranes, Erich, (2003), 'European Human Right Protection and the Contested Relationship of the ECJ and National Courts: Convergent Solution under International European and National Law?', in *The Banana Dispute An Economic and Legal Analysis*, eds. Breuss, Fritz, Griller, Stefan and Vranes, Erich, Springer Wien –NY/USA, p.198.

[187]See case C-173/99 *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v. Secretary of State for Trade and Industry* (2001), E.C.R. I-4881. See also Carozza, Paolo, (2004), 'The Member States', in *The EU Charter of Fundamental Rights: Politic, Law and Policy: Essay in European Law*, eds. Peers, Steve, and Wards, Angela, Hart Publishing – Oxford/UK, pp. 54, Carozza concluded that this case represented the undivided attention of EU law in fundamental rights of EU citizens.

[188]Article 230 EC Treaty, see also Szyszcak, Erika, and Cygan, Adam, (2008), *Understanding EU Law: Second Edition*, Thomson – Sweet & Maxwell- London/UK., pp.86. *See also case C-271/91 Marshall v. Southampton Health Authority No.2 (1993) E.C.R. I-4367.*

[189]See Parkinson, K.A., (1989), 'Admissibility of Direct Action by Natural or Legal Person in the European Court of Justice: Judicial Distinctions between Decision and Regulations', *Texas International Law Journal* No 24, pp. 433.

[190] See Lang, John Temple, (2000), 'The Principle of Effective Protection of Community Law Rights', in *LIBER AMICORUM in Honour of Lord Slynn of Hadley: Judicial Review in European Union Vol. I*, eds. O'Keeffe, David, and Bavasso, Antonio, Kluwer Law International – the Hague/Netherlands, pp. 250.

[191] See Bondi, Andrea, and Farley, Marten, (2009), *the Right to Damages in European Law: Kluwer European Law Collection – 5*, Kluwer Law International – the Hague/Netherlands, pp. I67. These authors explained

rights inherent from EU Law which is provided for private economic actors, these legal entities are as well bound duty to apply national laws. For example, pursuant to Article 54 TFEU, in order to be considered as a 'company', the private economic actors must satisfy two requirements. First, private economic actors must have been formed in accordance with the law of a Member State, and they have registered office, central administration of principal place of business within the EU.Second, a Member State may define the connecting factors required for a company to be incorporated under its law and for it to continue to retain that status.[192]

In conclusion, this research emphasized the existence of private economic actor's right which derives from their national constitutions and law. The important argument regarding of this is whether the state is not merely enhancing dichotomy of rights and obligations of private economic actors before ensuring the right of them in peculiar circumstance (i.e. *locus standi* of Business Corporation against government intrusion that against their constitutional right).

The rights of private economic actors in general are instituting to what extent the dependency of state to their economic actors *vice versa*.[193] These private economic actors are stanchion of economic growth in each country, thus state as economic regulator should be more perceptible in protecting its private economic actors. In this sense, it refers to all legal rules which mitigate the conduct of private economic actors within its territory or cross border. This dependency can be measured by economic indicators (such as labor, export-import, investment, internal market equilibrium, and income per-capita and GDP), but the rationalization of protection the right of economic private actors tends to support elimination of studious economic stalemate in every country, i.e. uncertainty of law enforcement, constraint of right until decreasing of GDP.

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regarding the right to seek compensation in damage caused to disobedience of EU Treaty. These private economic actors (individual) had the possibility of a restitutionary claim against the national authorities; it must first exhaust that right under national law before seeking damage for non-contractual liability against the EU under Article 340 TFEU. See chapter III.

[192] See Moens, Gabriel and Trone, John, (2010), 'Commercial Law of the European Union', in *IusGentium: Comparative Perspectives on Law and Justice* No. 4,eds. Sellers, Mortimer and Maxeiner, JamesSpringer Science + Business Media – New York/USA, pp. 88.

[193]See Arnold, Roger A., (2008), *Macroeconomics 8th Edition*, Thomson South Western Cengage – Ohio/USA, pp. 375. Business can influence the total value of all final goods and service produced annually within the country (GDP). In the business cycles, the activity of business also influence the GDP where all industries are seeking economic growth, full employment and price stability, which is presumably supported by government's economic policy. On the other hand, government policy is influencing the stability of business cycles by promulgating new law in economic activities.

A state is also providing broad possibility for its economic actors to conduct their activities in the large spectrum such as cross border supply and demand in the sphere of international trade in order to gain their benefits.[194] Prior to it, state should be willing to gain economic relation in the virtue of international economic relation. As mentioned before, interstate economic relation is dealing with coordination of economic policies and cooperation; hence states are building rule of law in international economic relation as the prevailing part of the object of international economic law.

1.3.2. Private Economic Actors at the International Economic Law Level

The argument regarding the international economic law mostly begins with the notion and good will of state to conduct further cross border relation in economic field, such as monetary and financial issues, investment, transport and communication, industrial and agricultural and more.[195] However, the core of intensive international economic relation begins with individual economic interest, then state's economic interest and the latest is economic interest in the range of sub- regional, regional and global.[196] The global economic

[194]For a comprehensive account of the intellectual history of free trade theory, see: Irwin, Douglas, (1996), *Against the Tide: An Intellectual History of Free Trade*,Princeton University Press-NJ/USA., pp. 28. Irwin refers to Adam Smith Theory in Adam Smith, (1776), *The Wealth of Nations*, reprinted (1937), Modern Library Edition- NY/USA, pp. 424.

[195]For the definition of International Economic Law, see Zamora, Stephen, (1996), 'Introduction: International Economic Law, *University of Pennsylvania Journal of International Economic Law*, Vol. 17, Issue 1, pp.63-67. Zamora argued that some scholar limit the definition of international economic law to encompass only economic relations between nations, a kind of public international law of economic relation. Conversely, can intergovernmental economic relations be effectively analyzed without resort to the effect on private transaction? Accordingly Zamora created definition of international economic law comprises a broad collection of laws and customary practices that govern economic relations between actors in different nations, includes examination of both law and policy issues on multiple levels including private law, local law, national law and international law. However, Louis Henkin argued although international economic law is blending between national law and international law, public and private law, it is still in a confinement of integral part of international law in general. The contract of concession between state and Oil Company is not constituted a treaty under international law but merely international economic relation. *See*Henkin, Louis (1995), *International Law: Politics and Values*, MartinusNijhoff Publisher – Leiden/Netherland, pp. 146. *See also*VanTheemat, Pieter Verloren, (1981), *The Changing Structure of International Economic Law*, MartinusNijhoff Publisher-Leiden/Netherland, pp. 13. Van Themaat argued that the actual extraterritorial effect of economic law as opposed to the juridical effects limited to the domestic area. Opposite to Zamora and Henkin, Schwarzenberger argued that common drawbacks of 'blending or mix' approaches are methodology incorrect. See Schwarzenberger, G., (1966), 'The Principles and Standards of International economic Law', in *Recuil des Cours* I, vol. 117, pp.7. See also Jackson, John H., (1995), 'International Economic Law: Reflections on the "Boilerroom" of International Relations', *American University Journal of International Law &Policy*, No. 10, p. 595 - 596. Jackson refers in speculation almost 90% public international law is international economic law by argued that international economic law can cover a very broad inventory of subject which is embracing the law of economic transactions, government regulation of economic matters, and related legal relations including litigation and international institutions for economic relations.

[196] See Petersmann, Ernest-Urlich, (2005), 'Bridging Foundations – Human Rights and International Trade Law: Defining and Connecting the Two Fields', in *Human Right and International Trade*, eds. Cottier, Thomas

relation derives from common economic interest of states which is influenced by individual economic interest within the country, hence, to meet this common economic interest, state construct extraterritorial economic agreements which is creating international legal rules.[197]These legal rules are inevitably creating a question, whether they are binding and benefiting only state or also binding a private actor subject to the jurisdiction of the state. In this sense, Trachtman made an argument that governments increasingly recognize the issue that international economic law also governs and recognizes the interest of private person. In supporting it, the government engages in efforts to unify or organize this interest by espousing "international private law" in order to facilitate business. They often do so through public international law technique, including entry into treaty. Accordingly, private economic actors may have obligations as well as rights. Rights and obligations may arise either directly by the treaty or customary law, or indirectly by an act of transformation. But, the spectrum of transformed perspective of international economic law does not reject domestic values, including economic interest. Thus domestic values can be maximized through international action.[198] From this argument, another question then arises, what is the correlation between private economic actors and international economic law? According toVanThemaat, "international economic law should meet the requirements of the infrastructure of national economic policies and national economic law".[199] This is clearly an argument that the national economic law which is representing the national economic interest could be the primary reason to commit international economic law in the sphere of development of cross border economic activity. Hence, government as economic regulator tends to follow its constituent

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Pauwelyn, Joost, andBurgi, Elisabeth, Oxford University Press – Oxford/UK., pp.42.Petersmann mentioned that the agreement among states have evolved bottom up in response to the demand of private economic actors and continues to be regulated in national, regional and worldwide rules.

[197] See Voitovich, Sergei A., *Supra Note 165*, pp.5. Contradictory to it, *see also*Cooper, Richard, (1967), 'National Economic Policy in An Interdependent World Economy', *Yale Law Journal*, Vol. 76, No. 7, pp. 1273. Cooper mentioned that the growing economic interdependence among countries makes the successful pursuit of national economic objective or interest much more difficult. Nonetheless Van Themaat argued that interdependency of states in economic activity (in his word 'economic intervention at international level') is obvious to realize the objective of national economic interest, since historically at national level in the west, that is no longer possible to achieve a number of the objectives of national economic policy through national means only. For example of these objectives including combating unemployment and inflation, a stable value of money, a well balance of payments etc. It is necessary to have international intervention in addition to international rules for liberalization and non-discriminations simply for realization of the objective of national economic interest. *See*VanTheemat, Pieter Verloren, *supra Note 195*, pp. 15-16.

[198]Trachtman, Joel P., (1996), 'the International Economic Law Revolution', *University of Philadelphia Journal of International Economic Law*, Vol. 17, Issue 3, Fall 1996, pp.5.

[199] Van Themaat, Pieter Veloren, *Supra Note 195*, pp. 16.

in avoiding *laissez faire* of international economic relations.[200] In addition, the motivation behind a global economic agreement is the intention of state to enhance its private economic actors to gain broader benefit[201] without putting aside the common interest in international economic achievement.[202]

Private economic actors silently exist in the array of international economic law, for example the Charter of Economic Rights and Duties of States (CERDS) of 1974 obliges state to accommodate right of its private economic actors or individual (both citizen and foreigner) who is conducting business within its territory .[203] The main issue of this charter is state 'have the right' or have 'the duty or responsibility', over its private economic actors within its territory.[204]Van Themaat mentioned although CERDS pays less attention to the rights of

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[200] See also Kohona, Palitha T.B., (1985),*The Regulation International Economic Relations through Law*, MartinusNijhoff Publisher-Leiden/Netherlands, pp. 5. Kohona argued that in the contemporary world, this would result in the development of a closer relationship between international norms and domestic norms. Since international economic relation tends to affect citizen. As the world becomes more economically interdependent, more and more private citizen will find their jobs, their business, and their quality of life affected. Thus they will be more affected by the economic policy pursued by their own country on their behalf. The result of this, citizen of the country could be expected to assert them in more aggressive and require their government to respond their needs to a greater extent in development of international economic relations, and participating in formulating international economic policy.

[201]See Love, Patrick, and Lattimore, Ralph, *Supra Note 143*. These authors explore the advantage of conducting international trade both from state's focal point and individual interests. See also Carbaugh, Robert J., (2009), *International Economics 12th edition*, South-Western Cengage Learning-Ohio/USA, pp.27 – 29.

[202]See General Assembly Resolution**,** A/RES/S-6/3201, *Declaration on the Establishment of a New International Economic Order (NIEO)*, 1 May 1974. *See Also*Makarczyk, Jerzy, (1988), *Principles of a New International Economic Order: A Study of International Law in the Making*, MartinusNijhoff Publisher-Leiden/Netherlands, pp.177-181. The Declaration of NIEO was supplemented by the principle of the economic common interest of all state. However this declaration stress out the duty of state to take into account the economic interest of other state, in taking economic decisions. Every states has the primary responsibility to promote the economic, social and cultural development of its people, but it is entitle to seek development assistance from the international community in order to overcome temporary or structural obstacles for implementation of this task.

[203]Subedi, Surya P. (2007), *International Economic Law, Section A: Evolution and Principles of International Economic Law*, The University of London Press – London/UK, pp. 23. See also Chatterjee, S.K., (1991), 'The Charter of Economic Rights and Duties of States: an evaluation after 15 years', *International & Comparative Law Quarterly*, Vol. 40, Issue 3, pp.100

[204]See GA Res. 3281(xxix), UN GAOR, 29th Sess., Supp. No. 31 (1974) 50,*Charter of Economic Rights and Duties of States*, Article 2(1), "every state has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities". In this article, equating peoples (individual), states make sense inasmuch as people act through state and state sponsor agency. People could also mean all persons within the state in which case the power of state to freely dispose natural wealth and resources would be subject to the consent of all people within the state. See Kofele-Kale,Ndiva, (2006), *The International Law of Responsibility for Economic Crimes*, Ashgate Publishing – Farnham/UK, pp. 109-110. Coherent with it, see Article 5 of CERDS; "All States have the right to associate in organizations of primary commodity producers in order to develop their national economies, to achieve stable financing for their development and, in pursuance of their aims, to assist in the promotion of sustained growth of the world economy. In particular is accelerating the development of developing countries.

individuals, enterprises and peoples, the rights itself derives from obligations and responsibility of state. States is obliged to attain of wider prosperity among all countries and of higher standard of living for all peoples.[205] But of course to explicate the rights of people or/and private economic actors in a broad spectrum will not be able to detach from relevant human rights law postulate as "economic right"[206] which sets out in the International Human Right Law such as Universal Declarations of Human Rights (hereinafter UDHR)[207], International Covenant on Economic, Social and Cultural Rights (hereinafter ICESCR)[208], at the Regional level, EU members recognize economic rights in their treaty[209]. Accordingly,

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Correspondingly, all States have the duty to respect that right by refraining from applying economic and political measures that would limit it." From this article, silently describe to pursue national economic aims; state delivers its right to 'people' in conducting business within its territory.

[205]Van Themaat, Pieter Veloren, *Supra Note 195*, pp. 268.

[206] Relation between economic rights and interest of private economic actors is, private economic actors are the institution representing the group of individuals in achieving their economic rights. According to international human rights law, individual has right to attain its economic rights, such as right to work. See article 23 (1) Universal Declaration on Human Rights 1948; "*everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment*". The healthy firm, Business Corporation or other forms of private economic actors will support the achievement of worker to achieve their economic rights. This right is presumably entail two obligations, obligation of owner (direct to individual) and government (as economic regulator).*See also*Naverson, Jan, (1992), 'Democracy and Economic Rights', in *Economic Rights*, eds. Paul, Ellen Frankel, Miller Jr., Fred D., and Paul, Jeffrey, Cambridge University Press & Social Philosophy and Policy Foundation – Cambridge/UK., pp. 41. Economic rights are also relating to the freedom to engage in economic activities. It is similar to be free to produce and to be free to trade what we produce. In the means of production, trade and distribution, this freedom is not restricted by the states preventing from buying, selling and operating means of production. And the relation of employment is, if the people are allowed to own means of production, then potential employees are allowed vastly greater array of potential employment.

[207]See article 22 of UDHR. The main idea of Article 22 of UDHR is enhancing the protection of economic, social and cultural rights of each individual around the world. See Ishay, Micheline R., (2007), *the Human Rights Reader: Major Political Essays, Speeches, and Documents from Ancient Time to Present (second edition)*, Routledge Publisher – NY/USA, pp. 39, *See also*Andreassen, Bard-Anders, (1999), 'Article 22', in *The Universal Declaration of Human Rights : A Common Standard of Achievement*, eds. Alfredsson, Gudmundur, and EIde, Asbjorn, MartinusNijhoff Publisher – the Netherland. pp. 477.Andreassen mentioned that economic, social and cultural rights were considered "programmatic" or "aspirations", and hence not a matter of a claim-rights and entitlements. The fulfillment of these goals was to be obtained gradually when resources were created through economic growth. These rights are apparently were a matter of public policy and therefore ill-suited to legal enforcement and judicial review. Linked to these ideas, assumption that economic, social and cultural rights were economically expensive, demanding a strong interventionist states (positive rights).

[208]See Article 1(2) of ICESCR: "all peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation based upon the principle of mutual benefit, and international law." The very logic interpretation of this provision presupposes that the people might want to trade their natural resources. See Bartels, Lorand, (2009), 'Trade and Human Rights', in *the Oxford Handbook of International Trade Law*, eds. Bethlehem, Daniel, McRae, Donald, Neufeld, Rodney, and Van Damme, Isabelle, Oxford University Press – Oxford/UK, pp. 572. This article is also relating to Article 6 of ICESCR.

[209] Scout, Sionaidh Douglas, *Supra Note* 181.

economic rights as part of human rights are obligation of state, as Petersmann posited that human rights are not granted, but only recognized by government and citizens constitute governments with limited powers that must be exercised for the protection of human rights and public interest of their citizen.[210]

The economic rights of every individual within the country enforce the government to use its power to conduct international agreement in the field of international economic includes international trade.[211] This argument bases on the individual 'right to trade' which is advocated by Petersmann.[212] The right based approach to freedom of trade is focusing on the legal protection of individual rights to have, possess, produce, consume, buy or sell or otherwise acquire or dispose of scarce goods, services or capital which should be inevitably related to economic rights. It should be evolvedbottom up in respond to demands of citizens

[210]Petersman, Ernst-Ulrich, (1991), *Constitutional Functions and Constitutional Problems of International Economic Law*, Fribourg University Press – Fribourg, pp. 61-72. See also The 1993 Vienna Declaration and Program of Action, at the UN World Conference on Human Rights, GA. A/CONF. 157/23, 12 July 1993. According to this declaration, human rights and fundamental freedoms are the birth rights of all human beings; their protection and promotion is the first responsibility of governments.
Available at http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/A.CONF.157.23.En?OpenDocument, last visited December 2009.

[211]For comparison to this argument, see Schneider, Andrea K., (1998), 'Democracy and Dispute Resolution: Individual Rights in International Trade Organization', *University of Pennsylvania Journal of International Economic Law*, Vol. 19, Issue 2, summer 1998, pp. 537-638. Schneider mentioned about debate on the benefits of individual in international free trade. The debate about fast track authority for the Clinton Administration reflects concerns about the benefits of free trade agreements to the U.S. economy and fears that increased free trade with less developed states will lead to an elimination of jobs in certain manufacturing sectors. This debate focuseson whether it is even in our citizens' interests for the United States to join international trade organizations. Meanwhile, across the Atlantic Ocean, the ongoing debate about the "democracy deficit" in the European Union ("EU") demonstrates the concern with the decreased ability of citizens to have a say in what the laws are under the EU. This debate focuses on the ability of citizens to influence lawmakers in the substantive laws that directly affect their lives. In both of these debates, people have examined the legitimacy of internationaltradeorganizations and debated ways of structuring these organizations to be more democratic and more legitimate.

[212] See Petersman, Ernst-Urlich, (2006), 'Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution', in *International Trade and Human Rights: Foundations and Conceptual Issues*, eds. Abbott, F., Breining-Kaufmann, C. and Cottier, Thomas, University of Michigan Press – Michigan/USA., pp.29-51. The opponent to this right to trade mentioned that right to trade is obscure. No major human right convention currently includes any individual rights to trade. Indeed as posited by Peers, that no such right to trade exists in any international legal instrument and such a right exists only in a much-attenuated from national constitutions. And from normative point of view it would be anti-democratic to recognize such a right without proper processes of international treaty making their course. Furthermore, any free standing right would be subject to uncertainty about how conflicts might be resolved between it and other rights. See Peers, Steven, (2001), 'Fundamental Right or Political Whim? WTO Law and the European Court of Justice', in *The EU and The WTO: Legal and Constitutional Issues*, eds. De Burca, G., and Scott, J , Hart Publishing-Oxford/UK, pp.111

and legally protected in national, regional and worldwide rules.[213] However this right to trade will be eliminated if trade restriction is free to impose among states.[214] The trade restriction was a peril occurrence in the twentieth century. It can be traced back to the history of establishing of GATT 1947.

The emergence of The Great Depression was leading to the World War II, and in the interwar period, particularly after the damaging of the 1930 US Tariff Act was signed, many other nations began enacting protectionist measures, including quota-type restrictions, which chocked off international trade. The history was leading to the major initiatives of establishment of GATT 1947 and it followed 47 years later by the establishment of WTO in 1994. It was presumably would gain to the world welfare.[215] As Jackson explained "if such "liberal trade" goals contribute to world welfare, then it follows that rules which assist such goals should also contribute to world welfare. The policies which tend to reduce some risks lower the 'risk premium' required by entrepreneurs to enter into international transaction. This should result in a general increase in the efficiency of various economic activities, contributing to greater welfare for everyone". Assuming that the institutions are important, and the law plays a significant role of these institutions, so in turn, will lead parties to pay closer attention to the rules of the treaty system, in particular economic affairs driven by market-oriented principles of decentralized decision making, with participation by millions of entrepreneurs.[216]

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[213] See Petersman, Ernst-Urlich, *Supra Note 212*, p. 53. Petersmann has been unequivocal in giving relevant argument whether freedom of trade is also basic liberties. See also Sen, Amartya, (1999), *Development as Freedom*, Oxford University Press – Oxford/UK, pp. 146. Sen posited that freedom of exchange and transaction (trade) is itself part and parcel of the basic liberties that people have reason to value... the contribution of the market mechanism to economic growth is, of course, important but this comes only after the direct significance of the freedom to interchange.

[214]See Bartels, Lorand, *Supra Note 208*,pp. 575. Bartels mentioned international law has traditionally supported the right of states to adopt whatever protectionist trade policy they choose. However, recent years have afforded numerous examples of the severe economic consequences of protectionist trade measures, especially on small developing countries. For example, US cotton subsidies have so depressed the world price of cotton that cotton farmers in Chad, Mali, Benin and Burkina Faso, dependent on cotton exports, have a reduced ability to feed themselves, as well as suffering degradations of other economic and social rights. *See also*Alston, JM.; Sumner, D. and Brunke, H., (2007), *Impacts of Reductions in US Cotton Subsidies on West African Cotton Producers*, Oxfam America Press – Boston/USA, p. 1-13.

[215] Jackson, John H., (1990), *Restructuring the GATT System*, Royal Institute of International Affairs – London/UK, pp.9-10.

[216] Jackson, John H., (2006), *Sovereignty, the WTO and Changing Fundamentals of International Law*, Cambridge University Press – Cambridge/UK.,pp.88.

It is much comprehensible if the establishment of GATT – followed by the WTO- is merely concerned of state to secure its private economic actors in involving international trade without vexation of other state restriction or protection on trade. In addition, the WTO as international trade rules is necessary to fulfill the need of private economic actors for a degree of security and predictability of international trade. Private economic actors operating or intending to operate, in a country that is bound by such legal rule will be able to predict better how that country will act in the future on matters affecting their operations in that country.[217]

2. The Role of Private Economic Actors in the WTO

The WTO Agreements is created by governments of the Members as public international law.[218] Nothing in the WTO Agreements clearly mention directly about rights and obligations of private economic actors. It seems that the relationship to private economic actors (or may be individual) does not exist within the Marrakesh Agreement, because as a general rule, private parties are not legal subjects of the international legal order. They cannot be a party to an international treaty neither carry out direct right and duties derive from it.[219] However, this research will prevail upon this stigma, by looking closer at the essence of the WTO Agreement to discern of the role of private economic actors in the WTO. In the end, assumption of the relation between private economic actors and the WTO is a benevolent to answer the role of private economic actors in the WTO rules.

The main objective of the Marrakesh Agreement sets out in the Preamble of Agreement of Establishing the World Trade Organization is that:

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[217] Van den Bossche, *Supra Note 56*, pp. 39.

[218] See Sanson, Michelle, (2002), *Essential International Trade Law*, Cavendish Publishing – Newport/Australia, pp.4.Sanson mentioned that although the WTO constitutes a public international trade law, but it is immediately translated into private issues such as tariffs, dumping and taxes, since in the development of international law, the distinction between private and public international trade law has less meaning.

[219]Jackson, John H., *Supra Note 162*, pp. 127. *See also*Hauser, Heinz,(1988), 'Foreign Trade Policy and the Function of Rules for Trade Policy Making', in *Foreign Trade in the Present and A new Economic Order*, eds. Dicke, Detlev Chr., and Petersman, Ernst-Urlich, Fribourg University Press – Fribourg/Switzerland, pp. 18-38. Hauser emphasized that properly enforced international rules to reduce the risk of government interventions into private transactions. In addition, the ultimate test of international trade law is to be seen in the extent to which international commitments make government behavior more stable and easier to predict, both for private investor and trader and for other government.

"Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."

157 Members of WTO, including industrial countries and developing countries, are bound duty to comply with these objectives. By entering WTO and GATT 1994, these Members committed to reduce and bind most of their tariffs, to suppress many non-tariff impediments to international trade and to avoid discrimination against all economic agents of other state in accordance with non-discrimination and most – favored nation clause. These commitments are conceivable to support their private economic actors in achieving better income and benefit, to promote positive result of enhancing welfare, full employment and large volume of real income for individual at the end.[220] Thus, to achieve the objective of WTO, the country members should implement WTO rules within their national legislation.[221]

As mention before, state is propounded to commit international trade agreement on the basis of individual interest to achieve better life. It is also supported by commitment of government to preserve individual economic right underlines innational constitution. From the language of "raising standards of living", it is clear that Members had made commitment to trade liberalization as a mean for attaining the goal of enhancing human welfare and

[220] See Shell, G. Richard, (1995), 'Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization, *Duke Law Journal*, No. 44, pp. 877-878. Shells argued that WTO rules are a means for globally oriented business interest and their government allies to overcome domestic resistance to free trade, reduce the legal transaction costs that states impose on the movement of goods and services across national borders, and thereby enhance consumer welfare for citizen of all nations. For the literature review, See Hoekman, Bernard, (2002), 'The WTO: Function and Basic Principles', in*Development Trade, and the WTO: A Handbook*, eds. Hoekman, Bernard M., Matoo, Aaditya, and English, Philip, the World Bank – Washington DC/USA., pp. 41-49.

[221]Implementation of WTO agreements is unable to discharge the interpretation of them, where the interpretation of WTO agreements at the national level is to be found in the way these agreements are translated into national language, re-formulated in domestic legislation, interpreted in national's tribunals and courts, and actually administered by agents of state. See Qureshi, Asif H., (2006), *Interpreting WTO Agreements: Problems and Perspective*, Cambridge University Press – Cambridge/UK, pp. 70. For example from the vantage point of the legal effect of WTO agreements, the US law promulgated the Uruguay Round Agreements Act, P.L. 103-465, 19 U.S.C.§§ 3501.

development by facilitating social and economic rights, by restricting monopolies, trade barriers and discrimination.[222] In addition, the term of "full employment" also refers to UDHR Article 23(1)[223] and ICESCR Article 6. There is a broader argument regarding of relation between individual right in the WTO Rules. According to Petersmann, the worldwide liberalization and regulation of welfare-reducing trade barriers continues to be based on the GATT and WTO Law. The WTO Members emphasize that the WTO rules and policies must remain 'member driven' and outside the UN system. WTO Members have no responded to the UN proposals for human right approach to international trade. They continue to leave the clarification of the interrelationships between UN Law, WTO law and human rights to the WTO dispute settlement system. The member driven character of the WTO entails the WTO rules and policies tend to be 'producer driven' for the benefit of powerful 'rent seeking interest group' (such as textiles, agricultural and steel lobbies, and periodically elected trade politicians) to the detriment of general consumer welfare and citizen rights.[224] For this reason, Petersmann developed an idea of world trade constitution, which explicated the constitutional functions of WTO law. This constitutional function is paralleling constitutions at the national level. The main idea of world trade constitution is penetrating and extending the WTO guarantees of private (individual) rights.[225] However, the key of the objective of

[222]See Article 22 UDHR, *Supra Note 207*. See also Amani, Bita, (2009), *State Agency and the Patenting of Life in International Law: Merchants and Missionaries in a Global Society*, Ashgate Publishing – Farnham/UK, pp.247-248 However, reference to trade for the purpose of raising standard of living does more by filling the interstices of trade liberalization with a strong commitment to its social dimension.

[223] This right to work is obligation of state in a furtherance definition that state is oblige to fulfill full employment of its citizen, in supporting this state refers to Convention of International Labor Organization.

[224]Petersmann, Ernst-Urlich, (2008), 'State Sovereignty, Popular Sovereignty and Individual Sovereignty: From Constitutional Nationalism to Multilevel Constitutionalism in International Economic Law?', in *Redefining Sovereignty in International economic Law*, eds. Shan, Wenhua,Simons, Penelope and Singh, Dalvender Singh, Hart Publishing – Oxford/UK, pp. 32.

[225]Petersmann, Ernst-Urlich, (2000), 'Judicial Protection of Economic Freedom in National and International Law: Time for Bringing Rights Home', in*Judicial Review in International Perspective (Liber Amicorum, in Honour of Lord Slynn of Hadley)*, eds. Andenas, Mads, and Fairgrieve, Duncan, Kluwer Law International – the Hague/Netherland, pp. 475-476. Petersmann argued that the world constitutional function of WTO law, For instance, the WTO law guarantees freedom of trade, non-discrimination and rule of law go far beyond the unilateral guarantees in the domestic laws off WTO members. The Dispute Settlement Understanding (DSU) provides for compulsory dispute settlement procedures leading to legally binding rulings based on Panel reports, appellate review and arbitration awards. The WTO Agreements also establishes clear legal hierarchies for the treaty in multilateral trading system. The WTO institutions can adopt legally binding decisions by majority-votes, including authoritative interpretations of WTO law. Overall policy coherence is promoted by numerous references in WTO law to other worldwide agreement. However, the idea of the world constitution has been challenged by Howse and Nicolaidis, these authors mentioned that one of the key dangers of the use of the language of constitutionalization is that it encourages the idea that the WTO will ultimately de directly effective within states. See Howse, Robert, and Nicolaidis, K. (2001), 'Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far', in *Efficiency, Equity and*

WTO is the progressive removal of barriers that prevent or make more difficult beneficial exchange between producers and consumers located in different countries. The removal of barriers intend to enhance broad empirical support for the proposition that WTO promotes growth, economic stability, in turn supports investment in the creation and protection economic rights for individual.[226] Accordingly, it is comprehensible if the argument returns to the previous sub section in this research that private economic actors are holding important part in trade relation among countries,[227]since private economic actors are economic institution representing the group of individuals in order to achieve their economic rights. Without legal support and protection from their governments, including national and international legal support, these legal entities find a paucity of economic benefits. The legal support and protection principally derives from the national constitution where the constitution consists of individual rights and obligations of government to protect these rights. The argument about economic rights which are pertinent to the objective of WTO Agreement will be discussed in Chapter VI.This research will not argue to the Petersmann's idea nor agree to his idea, but principally WTO directly provides wide opportunity for private economic actors to achieve their trade benefits, through their governments commitment based on national constitution.

In relation between WTO Agreement and private economic actors, Charnovitz argued that similar to every international organization, the WTO connects in some ways to the individual, which inhabit the country. The main impact of the WTO on the individual springs up from the substantive disciplines of the trading system. For example, eliminating quotas can change the structure of production and employment within a country. In addition, the WTO also has an important connection to individuals through its procedural discipline which is implied by the government. For example,GATT Article X contains a sunshine provision calling for the prompt publication of trade laws, regulations, andadministrative rulings in order to enable both governments and "traders" to become acquainted

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Legitimacy: The Multilateral Trading System at the Millennium, eds. Porter, RB., Sauvé,Piere, Subramanian, Arvind, and Zampetti, AmericoBeviglia, Brooking Institution Press – Washington DC./USA, pp. 228.

[226]See Anderson, Robert D., and Wager, Hannu, (2006), 'Human Rights, Development, and the WTO: the Case of Intellectual Property and Competition Policy', *Journal of International Economic Law*, Vol. 9, Issue 3, September, 2006, pp. 707-747.

[227]See Strange, Susan, (1992), 'States, Firms, and Diplomacy', *International Affairs* Vol. 68, no.1, pp. 1-15. In an increasingly interdependent global economy, companies and individuals, not states, are the primary vehicles for conducting international trade.

withthem.[228]Charnovitzdoes not distinguish the purpose of substantive and procedural disciplines whether these are applicable for private economic actors solely or also individual. But prior to investigate these substantive and procedural disciplines in the WTO, it would be clearer if this sub section elaborate the role of private economic actors in the WTO Agreements.

2.1. Private Economic Actors in the GATT

GATT is not silently emphasizing the private economic actors to gain –non-discriminatory principle benefits from their governments. It can be seen in the Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994. In the preamble, "*GATT Article XVII provides for obligations on Members in respect of the activities of the state trading enterprises referred to in paragraph 1 of Article XVII, which arerequired to be consistent with the general principles of non-discriminatory treatment prescribed in GATT 1994 for governmental measures affecting imports or export by privatetraders."*[229]

Although this article raises confusing statement between preamble and paragraph 1, (state obliges to impose non-discriminatory principle to private trades , but in Paragraph 1 this Article also mention 'non -governmental' (means private enterprise) which has been granted exclusive or special rights or privileges)[230], but according to Mattoo, the essence of the interpretation of Article XVII creates no obligations to change the pattern of ownership (public to private) or to distinguish between governmental or non- governmental enterprises, because such enterprises (government or private enterprise) subject to government control, and perhaps enjoy exclusive or special rights or privilege in conducting exports and imports in goods. Article XVII therefore only contains substantive disciples on trading enterprise (government or private enterprise), which is relevant only for notification purposes, narrows

[228]Charnovitz, Steve, (2001),'Economic and Social Actors in the World Trade Organization', *ILSA Journal of International and Comparative Law*, spring, 2001, p. 259-274. See also Charnovitz, Steve, *Supra Note* 140. GATT Article X: 3(b) states that each contracting party requires maintaining judicial, arbitral or administrative tribunals or procedures for the purpose of the prompt review and correction of administrative action relating to customs matters.

[229]Understanding on the Interpretation of Article XVII of the General Agreement on Tariffs and Trade 1994, available at http://www.wto.org/english/docs_e/legal_e/08-17.pdf, last visited 11 April 2010.

[230]*Ibid,* Paragraph 1 " Governmental and non-governmental enterprises, including marketing boards, which have been granted exclusive or special rights or privileges, including statutory or constitutional powers, in the exercise of which they influence through their purchases or sales the level or direction of imports or exports."

the scope to all kind of enterprise (government or private economic actors) that have been granted exclusive rights or privileges.[231]

2.2. Private Economic Actors in Agreement on Agricultural

One of the types of private economic actors is producer, both producers in the raw level (e.g. farmers) and the second level of economic production (e.g. Textile Company). They constitute private economic actors in supporting the trade (domestic or international trade). The Agreement on Agricultural recognizes agricultural producer of the basic agricultural product and non-product.[232] These producers are usually subject to 'domestic support', 'subsidies' and 'restriction of market access through market price policy'. Accordingly, the objective of Agreement on Agricultural is to reform the principle and discipline on agricultural policy as well as to reduce the distortion in agricultural trade caused by agricultural protectionism and domestic support. The market price policy sometimes closes the competition opportunity for producers in international trade. The deployment of market prices support policies is resulting the differentiation of price between the domestic market price and world market prices of farm commodities which forces domestic consumers to pay higher price for food commodity than they would in a more liberal marketing environment. Domestic support policy includes a variety of measures aimed at raising the income of producers and sustaining the profitability of domestic farming (such as government direct payment and export subsidies).[233]

Apart from the explanation of the objective of Agreement on Agricultural, the main idea of this argument is, besides the obligation of Member not to protect its agricultural producers, this agreement also concerns in broadening the right of other members agricultural producer (or consumer at the end) to enjoy the fruit of market access principles.

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[231]Mattoo, Aaditya, (1998), 'Dealing with Monopolies and State Enterprise: WTO Rules for Goods and Services', in *State Trading in the Twenty First Century (Studies in International Economics – The World Trade Forum Vol. I)*, eds. Cottier, Thomas, Mavroidis, Petros C., and Schefer, Krista N., The University Michigan Press – Michigan/USA, pp.37-69

[232]Agreement on Agricultural, Part I, Article 1 Definition of Terms, "Aggregate Measures of Support" and AMS mean the annual level of support, expressed in Monetary terms, provided for an Agricultural product in favor of the producers of the basic agricultural product or non – product specific support provided in favor of agricultural producers in general, other than support provided under programs that qualify a s exempt from reduction under Annex 2 to this Agreement." Available at:(http://www.wto.org/english/docs_e/legal_e/14-ag.pdf) last visited 12 April 2010.

[233]See Haley, Stephen, Pearce, Richard, and Stockbridge, Michael, (1998), *the Implications of the Uruguay Round Agreement on Agriculture for Developing Countries: A Training Manual*, FAO UN Publications– NY/USA, pp. 15-18.

2.3. Private Economic Actors in GATS

General Agreement on Trade in Services may be seen as crucial place for private economic in the scope of WTO Agreements. In the virtue of most-favored-nation and national treatment principle, private economic actors who operate their business in services have discretion to conduct their business in across border under the cross border supply and commercial presence.[234] GATS recognize private economic actor as "service supplier", according to Article XXVIII: Definitions, paragraph (g). In paragraph (i) GATS also recognizes "juridical person" which means any legal entity duly constituted or otherwise organized under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association. GATS also regulate service in the field of aircraft, maritime, financial and telecommunications.[235]

In the term of cross border supply, the service takes place when the consumer remains in his or her own country, while the service crosses national borders, the supplier being located in a different country. The delivery of the service can be obtained for example by telecommunications features, internet, mail or courier.[236] In the cyber era, cross border supply is prominent in delivering service (i.e. online bank, international telecommunication etc.), thus GATS constitutes an international legal protection for those who operating business in cross border supply service.

In term of commercial presence, GATS regulation bases on the need of private economic actors who is necessary to establish a commercial presence abroad in order to ensure a close contact with the consumers in their territories at the various stages of

[234]The General Agreement on Trade in Services (GATS): Objective, Coverage and Disciplines, available at: http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm, last visited at 15 April 2010. GATS basically have four modes of supplying services, 1) cross-border supply is defined to cover services flows from the territory of one Member into the territory of another Member, e.g. banking, telecommunications or broadcasting. 2) Consumption abroad refers to situations where a service consumer (e.g. tourist, students or patient), moves into another Member's territory to obtain a service. 3) Commercial Presence implies that a service supplier of one Member establishes a territorial presence, including through ownership or lease of premises, in another Member's territory to provide service (e.g. insurance, hotel chain, and banking). 4) Presence of natural persons consists of persons of one Member entering the territory of another Member to supply a service (e.g. accountants, doctors or teachers)

[235]GATS annex on Air Transport Service, Annex on Financial Services and Annex on Telecommunications and Basic Telecommunications, available at http://www.wto.org/english/docs_e/legal_e/26-gats.pdf, last visited 15 April 2010.

[236]Publication of United Nations, (2002), *Manual on Statistic of International Trade in Services*, UN Publications – NY/USA. pp. 11

production and delivery, as well as after delivery. Commercial presence in the global market covers not only juridical persons in the strict legal sense, but also legal entities that share some characteristic, such as representative offices and branches. Under GATS, "supply of a service" includes production, distribution, marketing, sale and delivery.[237]

2.4. Private Economic Actors in the Agreement on the Application Sanitary and Phytosanitary Measures (SPS Agreement)

The SPS Agreement also mention about private economic actors, which is indirectly having obligations under it. Article 2, Basic Rights and Obligations, paragraph 3 is explicitly expressing non restriction to trade for private economic actors.

"*Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade*."

Furthermore, Article 13 also promulgates the role of private economic actors under this agreement. According to Article 13, "*Member shall take such reasonable measures as may be available to them to ensure that non-governmental entities within their territories, as well as regional body in which relevant entities within their territories are members, comply with the relevant provisions of this Agreement. In addition, Members shall not take measures which have the effect of, directly or indirectly, requiring or encouraging such regional or non-government entities, or local government bodies, to act in a manner inconsistent with the provisions of this Agreement. Members shall ensure that they rely on the services of non-governmental entities for implementing sanitary and phytosanitary measures only if these entities comply with the provisions of this Agreement*."[238]

Such an issue derives from application of Article 13 SPS Agreement is which entities are covered by its rules. This issue has gained prominence due to the fact that the adoption and implementation of SPS requirements is increasingly in the hands of body other than central government. Some of these bodies involve governmental action at sub-national level,

[237] *Ibid*

[238] SPS Agreement available at: (http://www.wto.org/english/tratop_E/sps_e/spsagr_e.htm) last visit 15 April 2010.

such as local government regulators (states or provinces) or at supra-national level, such as regulatory bodies under regional agreements. In addition, increasingly SPS requirements are imposed by private economic actors, such as supermarket and retail consortia.

The role of SPS Agreement of the WTO is merely to discipline government, not private in imposing SPS Standard. Since private sector standard have the potential to stimulate improvements in production practices and provide a competition advantage to producers that comply with these standards, they can also be extremely burdensome for suppliers and in particular for small-scale producers. This is due to the fact that compliance with particular private sector standard is required by large supermarket chains. The SPS Agreement therefore requires that SPS measures adopted by WTO members that may affect international trade, should comply with certain disciplines. For example SPS measure should aim at health protection, should be based on a risk assessments and it applied in a non-discriminatory manner.[239]

2.5. Private Economic Actors in Agreement of Textiles and Clothing

In the globalization era, most of textile and clothing companies are private economic actors. In addition, in some developing and least developed countries, the production of textiles and clothing is categorizing as small enterprise or small supplier. For example, most of Indonesian and Brazilian (and other developing countries such Thailand, Ghana, Vietnam, Bangladesh and India) textile producers and suppliers are middle low enterprises, (some Indonesian textile industries are homemade industries). They are categorizing vulnerable economic groups. Vulnerable economic groups are sensitive private economic actors in a developing and least developed countries. They are sensitive because of the number of workers they employ, their small impact on the domestic economy, and the lack of power to lobby their politicians, their vulnerability to international competition and their symbolic status. Hence, to support the sustainability, the growth and right to compete in the sphere of international trade, the Agreement on Textile and Clothing mandate to WTO members a subtle attention concerning small supplier of textiles and clothing, particularly those who are live in developing or least developed countries.[240]

[239]See Prevost, Denise, (2008), 'Private Sector Food-Safety Standards and the SPS Agreement: Challenges and Possibilities', *South African Yearbook of International Law*, Vol.33, pp. 4-9.

[240]See Agreement on Textiles and Clothing Article 1 (2),Members agree to use the provisions of paragraph 18 Article 2 and paragraph 6(b) of Article 6 in such a way to permit meaningful increases in access possibilities

2.6. Private Actors in Agreement on Anti-Dumping

Another particular agreement in WTO Law which is giving attention to private economic actors is Agreement on Anti-dumping, Article 4 concerning domestic industry.[241] From the parlance of Article 4, domestic industry means the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products. According to the Agreement on Anti-dumping, an antidumping duty is imposed when there is a dumping that causes a material injury to a domestic industry and the causation between the dumping and injury. However, if a domestic producers is related to or affiliated with exporters or importers of the product in question or the domestic producer is an importer of the product, national antidumping authorities may decide that such a domestic producer should be excluded from the category of domestic industry. This is because a domestic producer that is related to exporters or importers of the dumped product or is itself an importer of that product and thereby presumably benefits from such relationship does not need protection by an antidumping measure.[242]

From the brief explanation regarding the role of private economic actors in the WTO Agreement, it comes to a conclusion that private economic actors exist vividly in the array of WTO Agreements. Some agreements have made a clear statement regarding the private economic actors. It shows that, first, WTO Agreements profoundly require the Members to consider the right of private economic actors as a trade player in WTO, and second, some WTO agreements transmit obligation indirectly to private economic actors and the government should ensure to take such measure to accommodate its private economic actors to comply with these obligations.

Perhaps the most tangible view in the relation between private economic actors and the WTO is when the government applies both substantive and procedural rights in its

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for small suppliers and the development of commercially significant trading opportunities for new entrants in the field of textiles and clothing trade.

[241]See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Article 4 Definition of Domestic Industry. *Available at:*(http://www.wto.org/english/docs_e/legal_e/19-adp.pdf), last visited 12 April 2010.

[242]Matsushita, Mitsuo, Schoenbaum, Thomas J., and Mavroidis, Petros C., (2002), *the World Trade Organization: Law, Practice and Policy*, Oxford University Press – Oxford/UK, pp. 327.

domestic regulations. As Charnovitz mentioned that "It is similar to the GATT, the WTO does not accord rights directly to individuals, but rather mandates that Member governments do so".[243] This argument will lead to the next question; do private economic actors have rights derive from the WTO Agreement? A pertinent answer will be elaborated below in coherence with the arguments before.

3. Do Private Economic Actors Have Rights Derive from the WTO Agreement?

The question about right will entail the answer about obligation.[244] The substantive right derives from WTO rules is recognized as economic right which is on the other side as obligation of state.[245] Another precedent is procedural right which relates to the right of private economic actors to gain trade benefit through implementation of WTO Agreements by their governments.

3.1. Substantive Rights

Nothing in the parlance of WTO law mentions directly the substantive right for private economic actors, however the substantive right itself exist and apply indirectly through national law and regulations. Such a remarkable work has made by the WTO creators when Intellectual Property Right(hereinafter IPR) has been created to accommodate individual property right. The Agreement on Trade –Related Aspects of Intellectual Property Rights (TRIPS) requires Members to create and grant IPR to its national and nationals of other WTO Members. This right is peculiar since it is applied to individual. The person who is granted IPR is permitted to collect rents and to prevent others from infringing on their privilege for specified period.[246] Article 7 of the TRIPS refers to the objectives of IPR protection which puts emphasis on the public rationale. This article emphasizes the need for balance of 'the mutual advantage of producers and users of technological knowledge' and 'balance of rights

[243]Charnovitz, *Supra Note 228*.

[244]See Kratochwill, Friedrich V., (1999), *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, Cambridge university Press – Cambridge/UK, pp. 155. All arguments about rights stake out claims backed by reason why these demands should be socially protected. Rights are, therefore, not only insistent claims, but are also imposing obligations on others.

[245]Petersmann, *Supra Note* 212.

[246]WTO Annex 1C, Agreement on Trade-Related Aspects of Intellectual Property Rights, available at:(http://www.wto.org/english/docs_e/legal_e/27-trips.pdf), last visited 12 April 2010. See also Stoll, Peter-Tobias, and Schofkopf, Franck, (2006), *WTO, World economic Order, World Trade Law*, MartinusNijhoff Publisher – Leiden/Netherlands, pp.207-220.

and obligations between the inventor and users'. TRIPS is a set of IPR agreement that is created an obligation for government to protect IPR of its individual, through domestic law.[247]The most important protection in IPR is that TRIPS requires government to establish a process enabling the IPR holder to ask custom authorities to detain counterfeit trademark or "pirated" copyright goods. TRIPS also requires government to provide civil judicial procedures in order to protect right of IPR holder. Furthermore, TRIPS commits government to cooperate with a view to eliminate international trade in goods infringing intellectual property rights.[248] These rights are economic substantive right indirectly from WTO Law.[249] However, as a notion of IPR is right for individual, substantive right also indirectly exists for individual through the implementation of the objective of WTO.[250]Pettersmann also argued that the international WTO guarantees of freedom of trade[251], non-discrimination, and rule-of-law serve "constitutional functions" for protecting, enlarging, regulating, and mutually balancing equal freedoms and other individual rights across frontiers.[252] In this sense, without a doubt, economic substantive right is deployed by WTO to pursue the interest of individual through the obligations of governments.

[247]See also Anderson, Robert D., and Wager, Hannu, *Supra Note 226*, Anderson and Wager mentioned that TRIPS created a minimum protection of IPR rights of individual that leaves a fair amount of leeway to Member countries to implement its provisions within their own legal system and practice and fine-tune the balance in the light of domestic public policy considerations.

[248] Alvarez, José E., and Charnovitz, Steve, (January 2002), 'Triangulating the World Trade Organization'In Symposium: The Boundaries of the WTO, *American Journal of International Law*, Vol. 96, Issue 1, pp. 28-55. See TRIPS Agreement Part III: Enforcement of Intellectual Property Right.

[249]See Charnovitz, *Supra Note* 137. Charnovitz argued that IP right derives from TRIPS is economic substantive right. Nevertheless, according to Chapman, although several human rights instruments recognize a human right to one's own intellectual products, such a UDHR Article 27, the conceptual of IP as substantive rights differs in fundamental ways from its treatment as an economic interest under TRIPS. From human right perspective, intellectual property protection is understood more as a social product with a social function and not primarily as economic relationship. See Chapman, Audrey R., (2002), 'The Human Rights Implications of Intellectual Property Protection', in Mini-Symposium: Health and the WTO, *Journal of International Economic Law*, Vol. 5, Issue 4, pp. 861-882.

[250]WTO Objectives recognize the obligation of Member states to improve standard of living and full employment which in conformity with UDHR and ICESCR.

[251] See Petersmann, *Supra Note* 225, WTO rules generally protect freedom of trade (e.g. Articles II,XI GATT, XVI GATS), most favored nation treatment (e.g. Articles I GATT, II GATT, II GATS, 4 TRIPS Agreement), national treatment (e.g. Article III GATT, XVII GATS), private property rights (the TRIPS Agreement), rule of law and broadly defined public goods (GATT Article XVII-XXI, GATS Articles XIV, XIVbis., Articles 6-8, 30-31, 40 of the TRIPS agreement) for the benefit of private traders, investors, producers and consumers.

[252]Petersmann, Ernst-Urlich, (2008),'Constitutionalism and WTO Law: From a State Centered Approach Towards a Human Rights Approach in International Economic Law', in *The Political Economy of International Trade Law (Essays in Honor of Robert E. Hudec)*, eds. Kennedy, Daniel L. M., and Southwick, James D., Cambridge University Press – Cambridge/UK, pp. 33.

The GATS also entails substantive right indirectly to both individual and private economic actors. The substantive right for individual under GATS is free movement for natural person in supplying service.[253] In addition, the substantive rights for private economic actors derive from service mode of cross border supply and commercial presence. State is obliged to impose substantive right directly to service supplier or individual. In the context of substantive right for individual and substantive obligation for government[254], state must apply most favored-nation and national treatment principles, but does with a twist. As it in other WTO Agreement, the MFN principle prohibits discrimination, whether it is intentional or unintentional, and applies MFN principle regardless of the nationality of service suppliers.[255] In the GATS, state members should provide the service supplier transparency regarding the schedule of commitment in order to achieve market access in services.

3.2. Procedural Rights

To assist private economic actors to gain the benefits of WTO agreement, WTO creator established a number of procedural and administrative requirements to be met by the Members. These requirements provide indirect procedural right to private economic actors. Procedural right is right to due process regarding the implementation of WTO Agreements.

3.2.1. Procedural Right According to GATT

Article X 3(a) of GATT requires each party to administer in a uniform, impartial and reasonable mannerall its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article. This article constitutes procedural obligation of state to manage all its law, regulations, decisions and rulings in order to give such information for trading partner both governments and their enterprises.[256] Along with Article X 3(a), paragraph (b)

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[253]GATS Annex on Movement of Natural Persons Supplying services Under the Agreement, available at: http://www.wto.org/english/docs_e/legal_e/26-gats.pdf, to compare this argument freedom of movement of natural person is also recognized by EC Treaty. See Carozza,Paola, *Supra Note* 189.

[254]See Fidler, David P., Drager, Nick, Correa, Carlos, and Aginam, Obijiofor, (2006), 'Making Commitments in Health Services under the GATS: Legal Dimensions', in *International Trade in Health Services and The GATS: Current Issues and Debates*, eds. Blouin, Chantal, Drager, Nick, and Smith, Richard, the World Bank – Washington DC/USA,pp.150-155 General obligations and disciplines derives from GATS is known as substantive duties and procedural duties. State is obliged to perform these obligations in order to achieve substantive rights of individual and private economic actors under GATS.

[255]*Ibid*, GATS Part II General Obligations and Disciplines, Article II Most-Favored-Nation Treatment: With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and services suppliers of any other Member treatment no less favorable that that it accords to like services and services suppliers of any other country.

[256]See European *Communities - Regime for the Importation, Sale and Distribution of Bananas*Supra Note 38, Appellate Body clarified that the uniformity requirement is not a general non-discrimination obligation, such

requires each party '*to maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agency appeal to be lodged by importers; provided that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.'*

Article X of GATT enshrines the reference of transparency and due process which has been quoted by WTO Panel and Appellate body. In the case of the *United States – Fiber Underwear*[257], particular significance concerning Article X has been made by the Appellate Body that Article X merely enhances transparency and due process protections extend to administrative action taken by Members in relation to their own citizen (i.e. internal government and trader as well as foreign trader). Another point made by Appellate Body is that Article X, unlike other GATT provisions, is explicitly concerned with the rights and expectations of trader. Finally, the Appellate Body clarified that Article X allows challenge to the administrative measures that are otherwise WTO consistent.[258] The 'due process' and transparency constitute a procedural right that implies to private economic actors, in gaining its benefit from GATT Agreement.

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an MFN requirement. In other words, it does not deal with the substance of measure at issue, but only their administration. See also Davey, William J., (2004),'Dispute Settlement Practice Relatingto GATT 1994', in *The WTO Dispute Settlement System 1995-203 (Studies in Transnational Economic Law Vol. 18)*, eds. Ortino, Federic, and Petersmann, Ernst-Urlich, Kluwer Law International – the Hague/Netherlands, pp.210.

[257]*The United States – Restrictions on Imports of Cotton and Man Fiber Underwear, WT/DS24/R*, 8 November 1996. Appellate clarified that Article X may be seen to embody a principle of fundamental importance that of promoting full disclosure of governmental acts affecting Members and private persons and enterprises, whether of domestic or foreign nationality. The relevant policy principle is widely known as the principle or transparency and has obviously due process dimensions. The essential implication is that Members and other persons affected or likely to be affected, by the governmental measures, imposing restraints, requirements, and other burdens, should have a reasonable opportunity to acquire authentic information about such a measure and accordingly to protect and adjust their activities or alternatively to seek modification of such measure.

[258]Ala'i, Padideh, (2010), 'From the Periphery to the Centre? The Evolving WTO Jurisprudence on Transparency and Good Governance', in *Redesigning the World Trade Organization for the Twenty-First Century*, ed. Steger, Debra P., the Centre for the International Governance Innovation (CIGI) and Wilfrid Laurier University Press – Ontario/Canada, pp. 170-173.

3.2.2. Procedural Right According to TRIPS

The procedural right or due process right set out in TRIPS is the important stage in dealing with the enforcement of IPRs. TRIPS lays down minimum standard that must be reflected in the domestic laws of WTO Members. However, the TRIPS standard on enforcement of IPR does not attempt to harmonize member's law and practices. The general provisions under Section I Part III of TRIPS establish the obligation that member of WTO shall ensure the availability of enforcement procedures under their law.[259] The availability of the enforcement procedures under domestic law must be fair and equitable and must permit effective action against any act of infringement of IPR covered by TRIPS. However the application of the enforcement procedures shall be in a manner as to avoid the creation of barriers to legitimate trade and provide for safeguards against their abuse. Article 41 (5) of TRIPS confirm that the obligation for the availability of enforcement procedures does not create any obligations to put in place a judicial system and for allocation of resources for enforcement of IPR as a distinct from enforcement of law in general. TRIPS is specific on obligations of WTO member to make available effective mechanisms for enforcement without putting standard on measuring the operational and functional aspect of the mechanism in each country.[260] Furthermore, WTO Members have to put in place the required measures to ensure effective enforcement of IPR. The private domestic enforcement actions, brought by right holders under domestic law, will augment the top down role of the TRIPS Council and reduce the need for the dispute settlement action. Civil litigation brought by businesses operating in local market has the potential to assist in ensuring effective enforcement of intellectual property protection.[261]Accordingly, the enforcement of intellectual property rights involves

[259]TRIPS Agreement, Part III Article 41.

[260]Biadgleng, ErmiasTekeste, (2008), 'The Development Balance of the TRIPS Agreement and Enforcement of Intellectual Property Rights', in *Interpreting and Implementing the TRIPS Agreement Is It Fair?*, eds. Malbon, Justin, and Lawson, Charles Lawson, Edward Elgar Publishing-Glos/UK, pp. 120. Biadgleng explained according to Article 41 (5), TRIPS requires countries to make available to right holders civil judicial procedures concerning the enforcement of any IP right covered by TRIPS, and criminal procedures and penalties at least in cases of willful trademark counterfeiting or copyright piracy ion a commercial scale. Countries should adopt procedures to enable right holder to lodge an application with competent authorities, for the suspension of the release into free circulation of goods validly suspected to involve trademark counterfeiting or copyright piracy. The Judicial authorities should have the authority to order disclosure of evidence, injunctions, damages, prompt and effective provisional measures and disposition of infringing goods and materials and implements the predominant use of which has been in the creation of the infringing goods.

[261] Mathews, Duncan, (2002), *Globalizing Intellectual Property Rights: The TRIPS Agreement*, Routledge – London/UK, pp. 92.

procedural formalities in a number of hierarchical forums. Such formalities and procedures are designed to assist and help the owner of the rights not only to obtain them from the competent office but also to enforce them by preventing their infringement by others, usually competitor.[262]

The enforcement of intellectual property rights relies on a country's judicial system. Right holders fight infringement of their exclusive rights in front of the courts. To immediately stop infringing activities, they can request seizures or preliminary injunctions, if the claim of infringement is verified by trial, thus courts can demand the payment of punitive charges to the infringer of IPR holder.[263] From the explanation above, TRIPS also enforce 'due process' right through domestic law of right holder. An assumption derives from this argument, that nothing in TRIPS Agreement not to compel Member countries in protecting the substantive right of their IPR holders, both individual (i.e. copyright) and private economic actors (i.e. trademark).

3.2.3. Procedural Right According to Anti-Dumping Agreement (AD-Agreement)

The procedural right on Anti-Dumping Agreement lays down in Article 5, regarding the AD investigation.[264] Although nothing in AD Agreement requires Member to create domestic institution and legal basis for imposing measures in terms of AD Agreement, but as practical manner, Member generally create an institutional framework, with the investigating authorities designed and empowered to conduct Anti-Dumping investigations. The AD agreement does not contain any requirements or guideline in respect to AD investigation institution. The government generally establishes investigation institution as independent body from government. The function of investigating body in the context of AD Agreement is providing procedural support for domestic industry.

An investigation normally initiated as a result of a complaint in the form of a written application by the domestic industry alleging that it is suffering injury and a threat thereof because of dumped imports. The initial step is the consideration whether the application

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[262] Alikhan, Shahid, (2000), *Socio-Economic Benefits of Intellectual Property Protection in Developing Countries*, the World Intellectual Property Organization (WIPO) Publication- Geneva/Switzerland, pp. 153

[263] Braga, Carlos A Primo, Fink, Carsten , and Sepulveda, Claudia Paz, (2000), *Intellectual Property Rights and Economic Development*, The World Bank – Washington/USA, pp.6

[264] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Article 5, *available at:* http://www.wto.org/english/docs_e/legal_e/19-adp.pdf, *last visited* 12 April 2010.

meets the documentation requirement, if it is not; it has to be supplemented or re-submitted. Once the application is accepted as properly documented, the government of the exporting country has to be notified. The authority's body must examine the accuracy and adequacy of the evidence provided and takes a decision whether there is sufficient evidence. Before the investigation, the authority body must ensure that the application has the required degree of support of the domestic industry. An on the initiation of the investigations, the public notice therefore must be given.[265]

The due process clause in AD Agreement sets out in Article 6 (2) which is throughout the anti-dumping investigation all interest parties shall have a full opportunity for the defense of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting; a failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally. The due process clause inherently derives from AD Agreement as if it depends on member's legal system.[266] The incorporation of AD Agreement itself depends on the constitutional law of WTO Members. The AD Agreement may be incorporated directly into domestic legal system as is, or may be incorporated indirectly in to domestic law, by means of implementing or enabling legislation. Members commonly supplement the incorporation of the AD Agreement into domestic law by adopting a supplemental, or secondary, set provision in the form of regulations or subsidiary legal instrument.[267]

3.2.4. Procedural Right According to GATS

According to GATS Article VI (2), each Member *shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at*

[265]Czako, Judith, Human, Johan, and Miranda, Jorge, (2003), *A Handbook on Anti-Dumping Investigations*, Cambridge University Press – Cambridge/UK, pp.5-6.

[266]See for example the Anti-Dumping Law in Argentina, the 1998 Decree, together with the Anti-Dumping Agreement as incorporated into Argentina domestic legal system, forms the core of Argentina's current domestic regulation concerning anti-dumping measures. This law contains general principle of administrative procedures in anti-dumping such as principles of right to due process including right to be heard and right to offer and produce evidence, and the right to a reasonable decision. Nakagawa,Junji, (2007), *Anti-Dumping Laws and Practices of the New User*, Cameron May – London/UK, pp.337.

[267]Czako, Judith, Human, Johan and Miranda, Jorge, *Supra Note* 265.

the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in service. Where such procedures are not independent of the agency entrusted with the administrative decision concerned, the Member shall ensure that the procedures in fact provide for an objective and impartial review. This Article basically provides a basic framework for minimizing the distortions of trade created by domestic regulation. The regulations that affect service bound by national commitments are to be administered in a reasonable, objective and impartial manner. To paraphrase Article VI member countries must provide procedures for the review of the regulation at the request of service suppliers and must be based on objective and transparent criteria. The review itself must not be more burdensome than necessary to ensure the quality of the services. And in the case of licensing procedures must not in themselves restrict the supply of the service.[268]

Article VI of GATS explicitly recognizes the right of service supplier to information on regulatory and administrative decisions and to judicial and administrative review and appeals process, and contains no provisions on notifications to the WTO or on bilateral consultations with other WTO members.[269]

3.2.5. Procedural Rights According to Subsidies and Countervailing Measures Agreement (SCM Agreement)

Article 11 of SCM Agreement indicates that an investigation to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written application by or on behalf of the domestic industry.[270] The SCM Agreement notably provides for detailed procedural requirement regarding the initiation and conduct of a countervailing investigation by the competent authority of the Member imposing the countervailing duties on subsidized imports. The main objectives of these requirements are to ensure that, the investigations are conducted in a transparent manner, all interest parties have the opportunity to defend their interests, and the investigating authorities adequately explain

[268]See GATS, Article VI available at:(http://www.wto.org/english/docs_e/legal_e/26-gats.pdf), last visited 12 April 2010. See also Beaulieu, Eugene, (2007), 'Trade in Service', in *Handbook on International Trade Policy*, eds. Kerr, William A., and Gaisford, James D., Edward Elgar – London/UK, pp.157.

[269]OECD, (2001), *Trade in Services: Negotiating Issues and Approaches*, OECD Publications Services-Paris/French, p.99.

[270]Article 11 of the Agreement on Subsidies and Countervailing Measures.

the basis for their determinations.[271]SCM Agreement pointed out in obligation of state for its private economic actors when one of the actors is an actor with aninterest in a new countervailing duty investigation has a right to receive notice, to present writtenevidence, to review the public docket, to be informed of the essential facts in time to defend its interest, to make a representation against the countervailing duty, to receive notice of preliminary and final determinations, and to seek judicial review.

The WTO provision for procedural rights extends both to adjudication and to rulemaking. However, in the context of SCM Agreement, government has firm authorities to rewrite its countervailing duty law or the accompanying regulations, and the SCM Agreement does not accord any procedural rights to the private economic actors. In other words, the SCM Agreement does not prior notice to the opportunity for public statement. The relevant possibility of the SCM Agreement gets to the rulemaking is that it gives a private economic actor an opportunity to comment on a governmental review of whether a countervailing duty should be discontinued.[272]

Substantive and procedural rights enshrine in WTO Agreements, could in particular be understood as duty and obligation of government to confer these rights in domestic regulation. However, when government disobliges these rights, nothing from the WTO rules provide an adequate discretion for private economic actors to challenge it before the WTO dispute settlement proceedings. In spite of regulating the right of private economic actors to challenge their government regarding their rights of trade before WTO dispute settlement proceeding, WTO otherwise requires the Members to provide legal and judicial remedies inside WTO Members in relations between private economic actors, governments and certain non-governmental organization (e.g. Articles X GATT, VI GATS, TRIPS and Article 13 Anti-Dumping Agreement, and Article 23 of SCM Agreements). These articles suggest that WTO rules must protect 'security and predictability' also for producers, investors, traders and consumers engaged in international trade. Some WTO rules indeed explicitly require domestic courts (e.g. Article XX Agreement on Government Procurement) or commercial arbitration inside the WTO (e.g. Article 4 Pre-shipment Inspection Agreement) to settle

[271]Van den Bosche, *supra Note* 56.

[272] See Charnovitz, *Supra Note* 143.

disputes in conformity with the relevant WTO Obligations or to protect individual trading rights and – in particular individual rights of intellectual property rights.[273]

The WTO agreement basically is involving the private economic actors in particular appropriate trade scheme. States intend to design trade treaties to encourage private economic actors to import and export from other private economic actors. In order to encourage the trade, WTO provide substantive and procedural rights for private economic actors that would basically require state not to take actions that would adversely affect these private economic actors. Accordingly, most of trade treaties – including WTO – basically provide a set of rights for private economic actors against the government who implement unfair trade regulation. However, WTO is currently structured as to provide Members these rights on behalf of their citizen rather than granting these rights directly to the citizens. But because WTO most affects private economic actors, it only makes sense that these rights have appropriate remedies.[274] Unfortunately, WTO does not provide direct remedies for private economic actors to against foreign government or their government who is implementing unfair trade regulation that restrains them to achieve trade benefits under the WTO.

Some authors argued that it is required for WTO to provide more apparent role for private actors to involve in dispute settlement system. For example, in a manner of democracy deficit coined bySchneider who discusses the link between domesticpolitics and international trade, where the involvement of private actors in the dispute resolution mechanisms of tradeorganizations has the ability to reduce the linkage between trade and domestic politicalinterests. While theoretically this link allows governments to be more responsive to theircitizens, in reality, the link between trade and politics keeps governments tetheredtospecial and well-organized interest groups. Once a state has determined that it is in itsnational interest to join a trade organization and once rules are adopted under thatorganization, the link to domestic political interests can be reduced by giving private actorsstanding to enforce the agreement. The governments therefore will be more responsible forfollowing the rules across the board rather than selectively.[275] In addition, more apparent argument in democracy absence argued by Young that "as power is centralized in an

[273]Petersmann, Ernst-Urlich, (2008), 'Judging Judges: From 'Principal-Agent Theory' To Constitutional Justice' In Multilevel ' Judicial Governance' of Economic Cooperation Among Citizens', *Journal of International Economic Law*, Vol. 11, Issue 4, December, 2008, pp. 827- 884

[274]Schneider,*Supra Note* 211, pp. 627 -638.

[275]*Ibid*, p. 587-594

organization or government and as increasing numbers of laws are passed, individuals have less ability to influence the actions of the organization or government, where at the WTO, the lack of access for other parties to dispute resolution mechanisms may be more appropriately termed, 'democracy absence'".[276] Concurrently, Young posited that if private partiesare denied sufficient access to the dispute resolution system, then the WTO will lose itslegitimacy as the final arbiter of international trade and its decisions will be renderedpowerless.[277]

Those arguments above basically denied the supremacy of rule of law underlies in the WTO as International Public Law, which theoretically absorb the sovereignty of state member to involve in the international organization. Thus, the portion of private economic actors as merely *amicus curiae* is ample to support their interest, since basically WTO rules are giving directly obligations among Members. Accordingly, this argument will continue to reveal the private economic actors in the WTO dispute settlement system without prejudicing the positive function of Members in enhancing their duties protecting the interest of private economic actors.

4. Private Economic Actors in WTO Dispute Settlement System

The WTO dispute settlement system is the most unique measure among the WTO Agreements. A controversial issue regarding the involvement of non-government entities in the dispute settlement system becomes debate amongst experts. This section therefore elaborates the place of non-government entities including private economic actors as *amicus curiae*[278] in the WTO dispute settlement system.

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[276]See Laihhold, Michael, (1999), 'Private Party Access to the WTO: Do Recent Developments in International Trade Dispute Resolution Really Give Private Organizations A Voice in the WTO?' *Journal of Transnational Law*, Vol. 12, autumn 1999, pp.449.

[277] Young, Michael K., (1995), 'Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats', *Journal of International Law*, No. 29, pp. 389 – 402.

[278]Amicus curia is defined as: "A person who is not a party to a lawsuit but who petitions the court to file a brief in the action because that person has a strong interest in the subject matter." See Cawley, Jared B., (2004), 'Friend of the Court: How the WTO Justifies the Acceptance of the Amicus Curiae Brief from Non-Governmental Organizations', *Penn State International Law Review*, Vol. 23 No. 1, summer 2004, pp. 47-78.Cawley elaborate the history of amicus curiae began with the permission from US Supreme Court to accept amicus curiae on behalf of non-party in the dispute as "dramatic and unusual" (case of Green v. Biddle, 21 US 1 (1823). Over years later, the filling of amicus curiae brief has also less controversial, and more frequent. The purpose and reasons for such submissions vary, but not largely so. Often, non-parties (whether they are governmental, private-interest groups, or private individuals) file briefs on behalf of constitutional, environmental, and civil rights issues. Amicus Curiae become more popular when international tribunal also use the brief submitted by non-governmental entities in the proceeding of court, see also Shelton, Dinah, (1994), 'the Participation of Non-Governmental Organizations in International Judicial Proceeding', *American Journal of International Law* No. 88, October 1994, pp. 611. Shelton

4.1. Private Economic Actors in the WTO Dispute Settlement System, Legal or Political issues?

WTO dispute settlement system is merely providing standing to governments on behalf of their trade interests. Private parties or non-governmental entities are not entitled to appear as party in the WTO dispute settlement process. However, according to Article 13 of DSU state that "*each arbitration panel's has right to seek information and technical advice from any individual or body which is deemed appropriate. However before a panel seek such information or advice from any individual or body within the jurisdiction of amember it shall inform the authorities of that member. A member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the member providing the information. Panels may also seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may request an advisory report in writing from an expert review group."*

Article 13 of the DSU authorizes WTO Panel and appellate body to seek and accept the 'solicited' amicus curiae brief from non-government entities. However in some cases, unsolicited amicus curiae brief become controversy such as in *the US – Shrimp case*,[279]when some NGOs submitted unsolicited amicus curiae briefs to both Panel and Appellate Body. The Panel rejected all of the unsolicited NGO submission, stating that "accepting non-requested information from non-governmental sources would be, in our opinion, incompatible with the provisions of the DSU as currently applied." The Panel interpreted the word "seek" in Article 13 to mean only those submissions that were explicitly solicited or requested. However, the U.S. argued on appeal that the Panel in this case had erred in finding the interpretation of Article 13 of DSU by concluding that it only applies to solicited or requested submissions. The Appellate Body therefore agreed with the U.S. and reversed the Panel's decision on this issue. The Appellate Body stated that "under the DSU, only Members who are parties to the dispute, or who have notified their interests become third parties in such a

summarizes the amicus curiae involvement in some international tribunals such as PCIJ, ICJ, EU Courts and WTO.

[279]*United States--Import Prohibitions of Certain Shrimp and Shrimp Products, Report of the Panel, WT/DS58/R* (May 15, 1998).

dispute to the DSB, have a legal right to make submissions to, and have a legal right to have those submissions considered by a Panel. Correlatively, a Panel is obliged in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding." In other words, Appellate body suggested that under Article 13 of DSU, a Panel has the discretion to look at or ignore any information, including submissions by NGOs, irrespective of whether such information was requested.[280]

Another case referring to the dilemmatic of unsolicited amicus curiae is *EC – Asbestos Case*[281]. In this case the Panel received five written submissions from asbestos victim group and industries. Two of these were appended to the EU submission and considered by the Panel as a part of defending party's arguments. The Panel then rejected the remaining three. Canada notified the DSB to appeal. In appeal proceedings, Appellate Body had received thirteen unsolicited amicus curiae briefs regarding the appeal. The Appellate Body then issued Additional Procedure which is only applicable to this particular case, mentioned that "to file an amicus brief stating that the decision to publish the criteria was made in the interest of fairness and orderly procedure in the conduct of the said appeal". After issued the Additional Procedures, Appellate Body then rejected and returned all unsolicited briefs, along with the adoption of new additional procedures. The Additional Procedures provided mostly all those who intended to submit amicus curiae briefs would first be required to submit application for leave to file such a submission with the Appellate Body. Only one of these NGOs, the Korea Asbestos Association subsequently submitted a request for leave in accordance with the Additional Procedures.[282]

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[280]Ala'I, Padideh, (2000), 'Judicial Lobbying at the WTO: the Debate over the Use of Amicus Curiae Briefs and the U.S. Experience', *Fordham International Law Journal*, Vol. 24, Issue 1, pp.62-94. See also Keller, Joseph, (2005), 'the Future of Amicus Participation at the WTO: Implications of the Sardines Decision and Suggestions for Further Developments', *International Journal of Legal Information*,Vol. 33. Issue 3, pp. 449-470. Keller stated that the Appellate Body in the case of US Lead and Bismuth II, (WT/DS138/AB/R, adopted 7 June 2000) determined that acceptance of amicus curiae briefs filed by the members is a matter of discretion, to be determined on a case by case basis. It seems appropriate for the Appellate Body to consider the underlying purposes of WTO lawanddispute settlement in making decisions of this manner. If the Appellate Body finds any amicus brief objectionable or simply not useful in deciding the dispute, it can choose not to consider that brief. This discretion will create a balance of interest by allowing access for amicus submissions while at the same time appropriately limiting the influence of such submissions.

[281]*European Communities--Measures Affecting Asbestos and Asbestos-Containing Products, Report of the Panel*, *WT/DS135/R* (Sept. 18, 2000).

[282]*European Communities – Measures Affecting Asbestos and Asbestos Containing Products, Communication from the Appellate Body*, WT/DS135/9, November 8, 2000. This additional procedure has been adopted by the Division hearing this appeal for the purposes of this appeal only pursuant to Rule 16(1) of the Working Procedures for Appellate Review, and is not a new working procedure drawn by the Appellate Body pursuant to paragraph 9 of Article 17 of the DSU.

The WTO Members then accused the Appellate Body of taking actions that were beyond its mandate under DSU. At the Special Session, many of WTO Members argued that the issuance of the Additional Procedures to allow acceptance of an unsolicited amicus curiae was only disturbing developments, such as acceptance of amicus curiae briefs in *the United States – British Steel Case*[283] and *US-Shrimp case*. WTO Members in the Special Session consented to declare that the issue of amicus curiae briefs was not procedural, but a substantive one that only Members could decide.[284] Of course this consensus was with contention from the U.S. According to the U.S Representative to the WTO, the Appellate Body did the only thing it could do by given the number of persons that either had already filed or expressed their intent to file friend of the court briefs.[285] The U.S. considered that acceptance of amicus curiae from non WTO Members especially from NGO was unavoidable since the submission of amicus curiae brief by outside groups were considered important. In several cases, the number of amicus curiae briefs being filed before the dispute resolution system of the WTO. In an effort to facilitate this procedure, the U.S. believe that the submission of amicus curiae briefs from NGO should be more formalized to allow for a more uniform and judicial means of submission.[286]

The discussion regarding the NGO in WTO become more intractable issues since some authors mention that involvement of NGO will enhance the WTO decision-making process, because NGOs will provide information, arguments and other perspective than the government itself. NGO is also acting as intellectual competitors to government.[287] Van den

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[283]*United States--Imposition of Countervailing Duties on Certain Hot-Rolled lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Report of the Appellate Body, *WT/DS138/AB/R* (May 10, 2000)

[284]Mavroidis, Petros C., (2002), 'Amicus Curiae Briefs Before The WTO: Much Ado About Nothing', in *European Integration and International Co-ordination: Studies in Transnational Economic Law in Honor of Claus-Dieter Ehlermann*, eds. Ehlermann, Claus-Dieter, Von Bogdandy,Armin, Mavroidis, Petros C., and Meny, Yves Meny, Kluwer Law International – the Hague/Netherland, pp.317-330.

[285]Ala'i, *Supra Note* 280.

[286]Cawley, Jared B., *Supra Note* 278. *See also*Pruzin, Daniel, (2000), 'WTO Appellate Body under Fire for Move to Accept Amicus Curiae Briefs from NGOs', *International Trade Reporter*, November 30, 2000, pp. 1805. In the Shrimp – Turtle case, the Appellate Body decide that the issue of admissibility of amici by the NGO was a separate legal issue, which it felt that the Panel did not specifically address in its report. The Appellate found that the attaching of amici to the material submitted by either the appellant or the appellee, regardless of where that material may have originates, render that material at least prima facie an integral part of that participant's submission."

[287]Esty, Daniel, (1998), 'Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion', *Journal of International Economic Law*, Vol. 1, pp. 123 -147.

Bossche mentioned that NGO participation will also increase the legitimacy of the WTO.[288] The legitimacy of WTO and public confidence in the WTO will increase when NGOs have the opportunity to be heard and to observe the decision making process, since the WTO itself as intergovernmental organization has been described as undemocratic and lacking in the transparency. Moreover, by allowing NGO to involve in WTO discussion, the WTO would hear about important issues which may not be adequately represented by any national government. However, this argument still in contrast with some developing countries member arguments. Most of developing countries remain object to greater involvement of NGOs in the WTO, because the opposite point of view remarked by NGO mostly inimical their interests, for example on environmental and labor issues. Moreover, developing countries perceive NGOs involvement will dilute their WTO membership rights, since many developing countries lack of resources necessary to fully participate at the WTO then believe that NGOs – especially which is well-funded by European and American export- will impinge upon developing countries rights as WTO members.[289]

The pros and contrast arguments regarding the involvement of NGO in WTO – in particular WTO dispute settlement system- are far from settled. Those arguments are conceivable since the definition of NGO is still ambiguous and inconsistent used by any international institutions. Lindblom mentioned that definition and criterion of NGO basically derived from UN Review Consultative Arrangements with Non-Governmental Organizations that established the definition of NGO as "any international organization which is not created by intergovernmental agreement shall be considered as a nongovernmental organization for the purpose of these arrangements."[290] Furtherance, Secretary-General of the UN proposed a definition of NGO as "a non-profit entity whose members are citizens or association of citizens of one or more countries and whose activities are determined by the collective will of

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[288]See Van den Bossche, Peter, (2008), 'NGO Involvement in the WTO: A Comparative Perspective, at Mini-Symposium on Transparency in the WTO', *Journal of Economic International Law*, Vol. 11 no.4, pp.717-749.

[289] Jeffords, Maura Blue, (2003), 'Turning the Protester into a Partner for development: The Need for Effective Consultation between the WTO & NGOs', *Brooklyn Journal of International Law*, Vol. 28, No.3, pp. 937-988.

[290]E/RES/288(X), Review of Consultative Arrangements with Non-Governmental Organizations, 27 February 1950, para. 8. In Lindblom, Anna-Karin, (2005), *Non-Governmental Organizations in International law*, Cambridge University Press – Cambridge/UK, pp. 38.

its members in response to the needs of the members or of one or more communities with which the NGO cooperates".[291]

From the definition above, a question arises whether private economic actors are NGO in the context of WTO. It seems logical if private economic actors are not NGO according to the UN definition, because private economic actors are profitable legal entities.[292] However for some reasons, private economic actors are able to be considered as NGO when they interests are represented by business association, for example in the British steel case, The Specialty Steel Industry of North America (SSINA) which represents all the producers of specialty steel in North America,[293] filed an unsolicited amicus curiae to Panel and Appellate Body on behalf of steel industries in North America. It emerges the fear of some developing countries regarding the involvement of private economic actors indirectly through their associations to dispute settlement system. Some authors argued that private economic actors are lurking the dispute by lobbying their governments to file against another WTO members regarding their inconformity with WTO rules.[294] Thus, if this NGO – which is representing the interest of private economic actors – has right indirectly or directly to involve in the WTO dispute settlement system, the balance of fairness will be diminishing. Moreover, if WTO allowed amicus curiae which came from industry groups rather than the more traditional NGOs, such as environmental groups, it will put them in disadvantage as the civil society

[291] General Review of Arrangements for Consultations with Non-governmental Organizations: Report of the Secretary-General, U.N. ESCOR, 1st Sess., Agenda Item 3, at 4, U.N. Doc. E/AC.70/1994/5 (1994). See also Black's Law Dictionary defines a non-governmental organization as, in international law, "any scientific, professional, business, or public interest organization that is neither affiliated with nor under the direction of a government; an international organization that is not the creation of an agreement among countries, but rather is composed of private individuals or organizations,"

[292] See Van den Bossche, *Supra Note* 288. Bossche explained that in the first Session of the Ministerial Conference in Singapore in December 1996, the WTO Secretariat accredited all non-profit NGOs that could point to activities related to those of the WTO. The accreditation criterion applied was the 'non-profit character of the NGO. Private companies and law firms were refused accreditation on the criterion of NGO.

[293] SSINA is a business association which the primary mission is to promote the expanded use and recognition of stainless steel. Activities include: a proactive marketing program focused toward architects, designers, engineers and other materials specifies to increase awareness of the value and potential of stainless steel; a resource for useful information and literature about stainless steel; and a cooperative partnership with other industry trade groups to promote the growth of markets for stainless steel. *Available at:* *(*http://www.ssina.com/about/index.html), last visited 20 June 2010.

[294] See Strange, *Supra Note* 227.

organization. In addition, developing countries are much fearer about this issue because they much weaker compare to developed countries.[295]

Apart from those arguments regarding the involvement of nongovernmental legal entities in the WTO dispute settlement system; this research will reveal the question whether the involvement of private economic actors in the WTO dispute settlement system is merely political or legal issue.

4.2. Legal Issue

The legal issue regarding the involvement of non-government entities or NGOs (including business association representing private economic actors) in the WTO dispute settlement system, will be divided into three arguments, first is legal issue regarding the acceptance of amicus curiae briefs, second is the involvement in WTO dispute settlement hearing and, third is the permissible of individual to represent the party to the dispute.

4.2.1. Amicus Curiae Brief

As mentioned above, Article 13 DSU provides a possibility for non WTO member to involve in the WTO dispute settlement system by submitting amicus curiae if it is requested by Panel or Appellate Body. the WTO dispute settlement process could find a way to manage a system wherein amicus curiae briefs were accepted. Panels and Appellate Body have authority but not obligation, to accept unsolicited (or solicited) briefs under Article 13 DSU. In fact, some unsolicited amicus curiae are accepted by the Appellate body since the interpretation of Article 13 (2) of DSU means that "panels may consult experts to obtain their opinion". In the *Shrimp/Turtle* case, Appellate Body determined that Panels could accept amicus curiae briefs under this language, because the briefs, although unsolicited, were part of the government submission, which are admissible.[296] It is similar to the British Steel case

[295]See Schneider, Andrea Kupfer, (2001), 'Unfriendly Actions: The Amicus Curiae Brief Battle in the WTO*'*, in *Institutional Concerns of an Expanded Trade Regime: Where Should Global Social and Regulatory Policy Be Made**?**,Widener Law Symposium Journal*, No. 87, Spring 2001, pp. 101-107.Schneider mentioned that the concerns about involvement of NGO in particular business group from some developing countries come in four types: (1) new policy is being made concerning amicus briefs by WTO Panels and the members should be deciding that rather than the panels; (2) NGOs will have more rights to participate than Member States; (3) the identity of these non-members is troublesome; and (4) any move away from the state-to-state interaction in the WTO is a bad one.

[296]*United States--Import Prohibitions of Certain Shrimp and Shrimp Products, Report of the Panel*, *WT/DS58/R* (May 15, 1998). See also Trachtman, Joel P., (2003), 'Private Parties in EC-US Dispute Settlement at the WTO: Toward Intermediated Domestic Effect', in*Transatlantic Economic Disputes: the EU, The US, and the WTO*eds. Petersmann, Ernst-Urlich, and Pollack, Mark A., Oxford University Press – Oxford/UK, pp. 530. Trachtman argued that under a regime of reasonably unrestricted access for amicus curiae, it would be highly impracticable for the dispute settlement system to undertake to recount and to respond each amicus brief in

when Appellate Body observed that "individual and organizations, which are not Members of the WTO, have no legal right to make submissions to or be heard by the Appellate Body. The Appellate Body has no legal duty to accept or consider unsolicited amicus curiae briefs submitted by individuals or organizations, not Members of the WTO. The Appellate Body has a legal duty to accept and consider only submissions from WTO members which are parties or third parties in a particular dispute. We are of the opinion that we have the legal authority under the DSU to accept and consider amicus curiae briefs in an appeal in which we find it pertinent and useful to do so".[297] This recommendation stressed out the acceptance of amicus curiae from non WTO member if:

1. The amicus curiae brief is requested by Panel or Appellate Body
2. The amicus curiae brief is deemed as part of each party's submission[298]
3. The Panel and Appellate Body find that amicus curiae brief are pertinent and useful in deciding particular case.[299]

It is clear that the Appellate Body search the interpretation regarding the amicus curiae from Article 13 of the DSU, since the Article 13 of the DSU the only reference for WTO adjudication body to conclude the legal authority under the DSU to accept amicus curiae.[300]

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the way that it does for member states brief. It appears that neither panels nor the Appellate Body are obligated to do so. Nevertheless, most member states of the WTO today seem to reject the possibility of amicus curiae.

[297]Appellate Body report on *United States - Imposition Of Countervailing Duties On Certain Hot-Rolled Lead And Bismouth Carbon Steel Products Originating In The United Kingdom*, WTO Doc. WT/DS138/AB/R of 10 May 2000.

[298] See case *European Communities-Antidumping Measures on Imports of Cotton-Type Bed Linen from India*, Panel Report, WT/DS141/R (Oct. 30, 2000),

[299] See case*United States-Section 110(5) of the U.S. Copyright Act*, Panel Report, WT/DS160/R, para. 6.3 (June 15, 2000)

[300]See the reverse argument, Mavroidis, *Supra Note* 284.Mavroidis stated that if Article 13 of DSU confers such authority to WTO adjudicating bodies, why did Appellate add in its Shrimps/Turtles decision that the Panel should consult with the parties to the dispute before accepting unsolicited information? The legal authority of Panels to request information from any source under Article 13 of the DSU is not subjected to any such prior duty to consult the parties to the dispute. More importantly, this article talks of the right of Panels to seek information from outside sources. See also Zhengling, Lin, (2004), 'An Analysis of the Role of NGO's in the WTO', *Chinese Journal of International Law*, Vol. 3 No.2, pp. 485-498. Zhengling mentioned that there is no consensus on the issue of amicus curiae at the Appellate body level. The Appellate Body has ruled that it is authorized to accept amicus curiae submissions and has determined that is has authority to issue procedural rules with regard to such submissions. To date, however, the Appellate Body has not taken into account any amicus submission that had not already been attached to a party's submission. For Appellate Body, the submission of amicus curiae is a procedural question, meanwhile for the rest of WTO members it is a substantive question that van only be decided at the General Council level.

4.2.2. The Involvement Private Economic Actors in WTO Dispute Settlement Proceedings

In some cases, private economic actors also get involve directly as delegation in WTO dispute settlement proceedings as long as their governments appointed them and they are constituted as delegation of the government of WTO members. For example in the *Banana Case*, Appellate Body has been ruling that parties and third parties are free to determine for themselves the composition of their delegation at hearings of Panels and Appellate Body. It should be understood that WTO adjudication body allow the presence of non-party in the dispute settlement proceeding as long as in the context of delegation of WTO member to the dispute. In the case *Korea – Certain Paper*, Panel rejected the objections of Korea against the presence of representative of the Indonesian paper industry as part of the delegation of Indonesia at the Panel meetings.

In the *Korea – Certain Paper* Case[301] at first substantive meeting with the Panel, Korea citing Article 18 (2) of the DSU stated that "there were representatives of the Indonesian paper industry in the Indonesian delegation and requested that they leave the hearing room because access to confidential information submitted by Korea would give them an unfair competitive advantage over their Korean counterparts". However, Panel argued that as provided in paragraph 15 of Panel Working Procedures, Indonesia was entitled to determine the composition of its delegation in these proceedings. Panel also stated that, in accordance with Article 18 (2) of the DSU and paragraph 15 of Panel Working Procedures, Indonesia assumed responsibility for its delegation, including respect for the confidentiality of the submissions made by the Korea in the proceedings.

The reason of some WTO members to include private economic actors as part of their delegation merely because some governments, especially from developing countries, are lacking of the resources to fully investigate and develop cases of unfair trade regulation from other WTO members. Meanwhile, private economic actors sometimes have access to information and expertise that governments lack. [302]

[301]WTO Panel Report, *Korea -- Anti-Dumping Duties on Imports of Certain Paper from Korea* (*Korea -- Certain Paper*), WT/DS312/R, Adopted on 28 November 2005

[302]See Zhengling, *Supra Note* 300.Zhengling refers to the Kodak case when to develop Japan's arguments regarding the anti-competitive conduct in Japan's photographic film and paper markets, Kodak employed a substantial team of lawyers, economists and translators in Washington as well as "a small army of experts in Japan, including several legal scholars, three Japanese market research films and nearly a dozen independent

4.2.3. The Permissible of Individual to Represent the Party to the Dispute.

The issue of private counsel representation before the WTO dispute settlement proceedings appeared when the Panel report in the *Banana* Case denied Saint Lucia's request for representation by two private legal advisers who were not full-time employees of the government of Saint Lucia.[303] It also happened in the case of *Indonesian-Certain Measures Affecting the Automobile Industry* when the government of Indonesia declared that its delegation included two private lawyers who were not permanently employed by Indonesian Government. The United States then argued that Indonesia private counsel should be barred from Panel's meeting.[304]

In the *Banana* Case, Appellate Body granted Saint Lucia's request to be represented by private counsel. The Appellate Body stated that there was nothing in the WTO agreement, the DSU, the Working Procedures, nor in customary international law or the prevailing practice of international tribunals which prevents a WTO member from composing its own delegation to an Appellate Body Proceeding, and to specify who can represent a government in making its representations before the Appellate Body. The Appellate Body also noted that in the interest of member government's representation by qualified counsel in Appellate Body proceedings, the representation by counsel of government's own choice may well be in a matter of particular significance – especially for developing country Members – to enable them to participate fully in dispute settlement proceedings.

In *Indonesia – Autos* case, Panel inclined to accept the private counsel before the WTO dispute settlement proceedings. Panel emphasized that all members of parties delegations – whether or not they are government employees – are present as representatives of their governments, and as such are subject to the provision of the DSU and of the standard working procedures, including Articles 18 (1) and (2) of the DSU and paragraphs 2 and 3 of those procedures.[305] It is similar to the Appellate Body ruling in the *EU-Bananas* case that

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translators. See also Chandler, C., (1995), *Dream Team" Helps Kodak Make Its Case; Trade Lawyers Uncover Crucial IndustryNewsletters*, Washington Post, 26 June 1995, A12

[303]See *European Communities--Regime for the Importation, Sale and Distribution of Bananas-Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WTO doc. WT/DS27/ARB (Apr. 9, 1999), Saint Lucia is an ACP state and a third party participant to the case.

[304]Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry* ("*Indonesia – Autos*"), WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R.

[305]*Ibid*.

permits governmental representation by private counsel in oral hearings before the Appellate Body.

4.3. Political Issue

Apart from legal issue regarding the involvement of private economic actors in the WTO dispute settlement system, each WTO member is dealing with political issue regarding to the public-private relation in WTO dispute settlement system. According to Shaffer, the vital role of public-private networks play in litigation before the WTO, although only WTO Member States can bring litigation before the WTO, private actors such as Business Corporation and activities play role in states' decisions about which case to bring.[306] Shaffer therefore mentioned although trade relations are enforced through a formal international agreement in which only states have standing, private economic actors can still be very influential. In the litigation process, private economic actors depend on authority of their government for access to the WTO legal proceedings, such as the submission of amicus curiae brief will constitute as part of party's submission, or the government itself is able to include any private economic actors as a part of their delegations before WTO meeting. In addition, government or public authority can politically rely on these private economic actors for financial and informational support. These networked partners evaluate the costs and benefits bringing a claim and litigating or settling the dispute.[307] In some circumstances, private economic actors can also initiate the dispute, for example in the United States, private economic actors used formal and informal channels to influence trade dispute settlement. These private economic actors can directly petition representatives of the U.S government to combat perceived trade barriers and discriminatory policies enacted by foreign governments.

In domestic political sphere, private economic actors can initiate dispute by using their domestic influence to get their government to raise the claim. In addition, some governments, such as the United States and the European Union, have instituted formal procedures by which citizens can petition the government to respond to another nation's trade violation.[308]For example, the private economic actors in the U.S may petition the U.S. Trade Representative (herein after USTR) to take action against a foreign nation's trade practices

[306] See Shaffer, Gregory C., (2003), *Defending Interest Public-Private Partnerships in WTO Litigation*, The Brooking Institution – Washington DC/USA, pp. 10-18.

[307] *Ibid*

[308] See Schleyer, Glen T., (1997), 'Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System', Fordham Law Review, Vol. 65, Issue 5, p. 2275 – 2311.

under Section 301. The private economic actors are able to report the unfair trade from other nations to USTR, and after an investigation, the USTR will decide whether the trade practice in question is violating any trade agreement and, if so, USTR will find what measure should be taken.[309] Similar to the U.S., the European Union adopted Regulation 2641/84 in 1984 which gives the right to petition the EU Commission to investigate harmful foreign trade practices. According to Regulation 2641/84, the Commission will initiate an investigation of the offending trade practice if it deems necessary in the interest of the EU.[310]

The private economic actors have broad discretion to approach their government in political dimension to support them to gain broader benefits under WTO rules. As mentioned in previous section of this chapter, private economic actors are able to lobby their government to involve in international trade[311] or when the dispute arise these private economic actors can use political approach to involve indirectly to the dispute, by either providing financial and informational support. Nevertheless, the political issue seems very delicate matter to confront in the domain of WTO rules, since the WTO itself will ignore this issue and leave it to each WTO member. Indeed, the main objective of WTO rules is enhancing trade benefits of WTO members which in the end the constraint of that international trade puts on states thus directly benefit, or concern, private economic actors.[312]

In all arguments regarding the involvement of private economic actors in the WTO Dispute Settlement system both from legal or political point of view, enhance the notion that private economic actors will not have any sufficient parts to involve in the WTO dispute settlement system unless their governments are willing to bring them in to it. Although some authors tend to support the direct involvement of private economic actors to standing before the WTO adjudication body, but as intergovernmental organization, WTO Member has

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[309] Puckett, A. Lyne, and Reynolds, William L. Reynolds, (1996), 'Sanctions and Enforcement Under Section 301: At Odds with the WTO?',*American Journal of International Law*, No. 90, pp. 675. The authors mentioned that the Section 301 is an inadequate method for private parties to protect their rights is that there is no guarantee that USTR will take action.

[310]Leirer, Wolfgang W., (1994), 'Retaliatory Action in the United States and European Union Trade Law: A Comparison of Section 301 of the Trade Act of 1974 and Council Regulation 2641/84', *North Carolina Journal of International Law and Commercial Regulation*, No. 20, pp. 41-96. The adoption of Regulation 2641/84 was largely a response to the United States use of section 301, however this regulation will less use since the decrease of Section 301 actions and the sparring of WTO dispute settlement system.

[311] See MacDonald and Woolcock, *Supra Note* 166, pp. 77-92.

[312] See Ohlhof, Stefan, and Schloemann, Hannes, (2001), 'Transcending the Nation-States? Private Parties and the Enforcement of International Trade Law', in *Max Planck Yearbook of United Nations law*, Vol. 5, eds. Frowein, J.A., and Wolfrum, R., Kluwer Law International – the Hague/Netherlands, pp. 675 – 734.

exclusive right beyond interference of individual or citizen from any WTO Member.

WTO is international organization which has characteristic as an intergovernmental organization, or as public international organization, when it is established by an interstate agreement. The WTO Members decide to create WTO for handling trade relation at the intergovernmental level, although at the end the governments of WTO Members have to make the laws regulating the behavior of the individual citizens,[313] thus the enforcement of WTO rules is solely in the hand of WTO Members.

5. Private Economic Actors in Case of the Implementation of Article 22 (2) of the DSU.

Chapter I elaborated the implementation of trade retaliation according to Article 22 of the DSU which the implication of trade retaliation is resulting trade effect directly to the private economic actors within the country that is retaliated. Although the authority to impose trade retaliation comes from WTO adjudication body and it is clearly recognized by the WTO Agreement, but the enforcement itself, such as raising tariff or suspending concessions, is carried out by the aggrieved state or by others on behalf of their trade interests.[314]

The implementation of Article 22 of the DSU is deemed to be complicated measures since the effect is likely bitter for private economic actors. However, nothing in the DSU provide the possibility for any private economic actors to complaint against WTO Members regarding this implementation, nor possibility of them to file against other state regarding the implications of WTO trade retaliation. The only possibility is when their own governments provide legal mechanism for these private economic actors to claim compensation concerning the loss of trade benefits caused by the action of their government's non-conformity with WTO rules. This research further elaborates the possibility for private economic actors to recourse to litigation or political approachin the domestic level. The possibility of these private economic actors to rebalance their trade benefit is using the principle of state liability and it will be elaborated in the next chapter.

[313]For basic theory of international organization see Schermers, Henry G., (1991), 'International Organizations', in*International Law: Achievements and Prospect (Part 1)*, ed. Bedjaoui, Mohammed,Unesco – Paris/French &MartinusNjhoff Publisher- Leiden/the Netherland, pp. 67-96.

[314] See D'Anieri, Paul, (2010), *International Politics Power and Purpose in Global Affairs*, Wadsworth Cengage Learning – Ohio/US, pp. 370 -372. D'Anieri mentioned that WTO dispute settlement mechanism might be described as an instance blended enforcement, when the retaliation is recommended by DSB, the enforcement is carried by the aggrieved member. This is totally different with the UN Sanction, when the UN itself carried out the sanction thorough the resolution of Security Council.

CHAPTER III
THEORETICAL OVERVIEW OF STATE LIABILITY IN THE EUROPEAN UNION AND THE UNITED STATES IN TERMS OF SEEKING COMPENSATION CAUSED BY THE WTO RETALIATION TO PRIVATE ECONOMIC ACTORS

1. Background

The important aspect of this research is elaborating the possibility for private economic actors to seek compensation for damage caused by WTO retaliation. Government should endorse a system to ensure its private economic actors to obtain redress when their trade benefits are infringed by the disobedience of its government to WTO rules. A basis remedy for compensation damage is applying state liability principle, where each WTO Member has different system in applying state liability principle. Accordingly, this chapter discuss about state liability principle in two different countries. First is European Union where the EU recognizes Member State liability and liability of EU Institutions.In the relationship with the WTO law, the focus is mischievous measures conducted by the EU Institutions. It thus leads to the implementation of the liability of EU Institution or EU liability according to Article 340 (2) TFEU. Second is the U.S. who recognizes state sovereign immunity which can be waived in term of unconstitutional act conducted by government.

This chapter also discuss about the effect of WTO Law to both EU and the U.S. legal system, in order to answer whether theoretically plausible for private economic actors to obtain compensation caused by the WTO retaliation by referring to the principle of state liability that is recognized by the EU and the U.S.,

2. The Perception of State Liability Principle

Unlike international state responsibility principle[315], state liability principle in this research is more to domestic obligations between state (government) and its citizen, or in

[315] *Articles on Responsibility of States* Supra Note 83. This document is a very important source in applying state responsibility for international wrongful acts and it is invoked in the jurisprudence of international courts. For instance in the case of *Barcelona Traction (Belgium v. Spain) (Judgment, I.C.J. Reports 1970)*, pp. 3; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Merits, I.C.J. Reports 1986)*, pp. 14; *Vienna Convention on Consular Relations (Paraguay v. United States of America) (Order, I.C.J. Reports 1998)*, p. 246; *Gabcikovo- Nagymaros Project (Hungary v. Slovakia) (Judgment, I.C.J. Reports 1997)*, p. 7; *Difference Relating to Immunity from Legal Process of a Special Rapporteuer of the Commission on Human Rights (Advisory Opinion, I.C.J. Reports 1999)*, p. 62; *La Grand*

other word is governmental liability.[316] Prior to it, this sub section briefly discuss the distinction between state responsibility, state liability based on international law (international liability), and state liability in domestic level.

2.1. International State Responsibility and International Liability

Article Responsibility of the States for International Wrongful Acts recognizes the distinction between term of international state responsibility and international liability. International state responsibility is concerned with the violation of a subjective international right even when it does not involve material damage. On the other hand, international liability is premised upon the occurrence of significant harm or damage and not on any violation of an international obligation or subjective international right of a state. Wrongful acts are focus of state responsibility, whereas compensation for damage became the focus of international liability.[317]International Law Commission (hereinafter ILC) emphasize that state

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(Germany v. United States of America) (Merits, I.C.J. Reports 2001), p. 466. See also Crawford, James, (2002), *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, - Cambridge/UK, p. 54. Article 1, every internationally wrongful act of a state entails the responsibility of that state. The terms of "international responsibility" covers the new legal relations that arises under international law by reason of the internationally wrongful act of a state. State responsibility principle derives from the concept of the law of nations. Once the existence of the law of nations was recognized, the issue of liability was presented of necessity, though no doubts at first obscurely. This principle also focuses on attribution of conduct to the state or government to individual or other state. In some cases, state responsibility principle is sometimes seen as special topic within public international law. It provides the foundation of the law of treaties and constitutes the most basic part of general international law. See Brownlie, Ian, (2004), 'State Responsibility and the International Court of Justice', in *Issues of State Responsibility before International Judicial Institutions*, eds. Malgosia Fitzmaurice, Malgosia, and Sarooshi, Danesh, Hart Publishing-Oregon/USA, pp. 11-18

[316]State liability is generally understood as the liability of the state and other public bodies for damages that are sustained in the course of performing official duties. In the broadest definition, state liability means that the state should make compensation for whatever loss and or injury or it is deemed to have caused directly or indirectly materially or mentally to its citizens. *See*Fuke, Toshiro , (1999), 'Historical Phases of State Liability as Law of Remedies – Some Introductory Remarks', in *Comparative Studies on Governmental Liability in East and Southeast Asia*, in Public Law in East and Southeast Asia, ed. Zhang, Yong, Kluwer Law International - the Hague/Netherlands, pp.1-6. For comparison to another country, *see*Luber, M, (2008), 'Liability of the State', in *Key Aspect of German Business Law – A Practical Manual*, eds. Wendler, M, Springer-Verlag-Berlin Heidelberg/Germany, pp. 263, as a constitutional state, Germany recognize governmental liability where state is governed by law and order, state liability principle supplements the principle of the lawfulness of the administration.

[317]United Nations, (2000), Yearbook *of International Law Commission 2000*, Vol. II, Part One, United Nation Publication – NY/USA, pp. 121. See also Zemanek, K., (2000), 'Responsibility of States: General Principles', in: *Encyclopedia of Public International Law*. Volume four, North Holland Publishing – Amsterdam/Netherlands, pp. 220, According to Zemanek the term state responsibility is classical one, which is used in the doctrine of international law. And the term state liability is used in international law for the purpose of stressing the application of state liability for lawful acts in case it is referred to only one form of liability to recover the damages.

responsibility principle creates a legal relationship for illegal acts of the state with other states, whether other states are suffering the damage or not in accordance to international law. This legal relationship can also affect other subject of international law. When the damage occurs, thus international liability principle can be implied by applying restitution or compensation, allowed by international law.[318]

In the domestic level, there is no general principle of liability for imputable breaches of international law exist that requires a state to provide compensation at national level. It is true that a state, by non-compliance with an international obligation, commits an international wrongful act and on that basis is obliged to provide reparation.[319]The government may imply a measure such as withdrawing or annulling a law that contravenes the international obligation, or by adopting a law to ensure that the result required by international obligation is achieved. However, significantly international law leaves states much freedom to choose the remedies required.[320] Some questions then arise, when a state breach international law which is causing damage to its citizen, to what extent is state liable to rectify the damage? What is the condition for rectifying the damage? In order to answer the question, it is necessary to discuss about the general perception of state liability principle in relation with individual or citizen.

2.2. State Liability Principle in Domestic Level

There are two principles of liability in general, strict or fault liability. Strict liability principle is a limited liability application. It is based on notions of equality and solidarity. This principle requires special, abnormal or exceptional damage as a result of measures taken in the public interest which may recover compensation without the need to prove fault.[321]Another principle is principle of liability based on fault. In terms of this principle, it requires damage results from a wrongful act or omission and negligence, which is at least, it must be proved. The fault may be a wrongful act of administration or omission. In some

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[318]Articles on Responsibility of States for Internationally wrongful Acts, *Supra Note 83.*

[319]*Ibid*, Article 31

[320]Nollkaemper, André, (2012), 'The Role of National Courts in Inducing Compliance with International and European Law – A Comparison, in *Compliance and the Enforcement of EU Law, Vol. 20, Book 2*, Ed. Cremona, Marise, Oxford University Press – Oxford/UK, pp.186

[321]Uksagis, Erdem Buy and Van Boom, Willem H, (2013), 'Strict Liability in Contemporary European Codification: Torn Between Objects, Activities, and Their Risks', *Georgetown Journal of International Law*, Vol. 44, pp. 610.

cases, the wrongful act or omission will give rise to a rebuttable presumption of fault.[322] The latest concept of liability principle is more often used by the court in order to imply state liability that required compensation of damage.

State liability principle or governmental liability descends from long historical evolution since centuries ago.[323]A government is obliged to secure for citizens their individual rights to a life worthy of human being. Thus when the damage (loss, injury, or property damage) caused to act of government in the course of any activities of welfare state suffered by the citizen, it is legitimate for government to compensate the damage.[324] This obligation derives from national constitution, where constitution consist obligation of government to protect rights of individuals.[325]Since this research is discussing economic activity, thus, the focus is economic right belongs to individual that derives from national constitution.

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[322] Steiner, Josephine, (1993), 'From Direct Effects to Francovich: Shifting Means of Enforcement of Community Law', *European Law Review*, Vol. 18, No. 1, pp. 3-22.

[323]For example in England, the maxim "The King can do no wrong" becomes a major principle from the medieval early period until the late eighteen century which is dominated by the question of monarchy liability. It derived from the common sense of the immunity of the Crown for torts against its subject. In legal principle, however, this was not strictly correct. The Crown was in fact considered to be subject to the law, as consonant with the principle of justice. For the breach of contract made with a government department on behalf of the Crown a petition of right will in general lie, which though in form a petition and requiring the sanction of the attorney General. Thus, many Government departments can be sued as such. See Dicey, Albert Venn, (1915), *Introduction to the Study of the law of Constitution*, in Michener, Roger E.,(ed.),(1982), Liberty Fund – Indianapolis, pp. 417.

[324]Fuke, Toshiro, *Supra Note 316*, p. 3. See also, Fairgrieve, Duncan, (2003), *State Liability in Tort: A Comparative Law study*, Oxford University Press – Oxford/UK, pp 189-190. Governmental liability is in the array of administration law where in the structure of and scope of legal remedies against administrative action, basically in the similar terms, to any legal system – civil law or common law- which attempts to balance the necessary freedom of governmental decision making with the protection of basic individual rights. Fairgrieve posited that exemplary or punitive damages are more relevant to state liability (case Rookes vs. Barnard 1964 AC. 1129). On the other hand, however Fuke stated that three different dimensions of state liability, 1) every loss/injury incurred by citizen in the course of state activities might only be compensated by rare change if specific civil servant was found tortuously and personal liable for the outcome, 2) the new idea of state liability is not limited the personal liability of civil servant, 3) state liability has to be extended to non-fault (strict) liability. See also Friedmann, Wolfgang Gaston, (1972), *Law in a Changing Society*, Steven & Sons Ltd. – London/UK, pp. 361.

[325]For definition of national constitution see Conant, Michael, (2009), The *Constitution and Economic Regulation: Objective Theory and Critical Commentary*, Transaction Publisher – New Jersey/USA, pp. 1. Basically the concept of constitution is the same in every country where constitution consist obligation of government to protect rights of individual.

2.2.1. State Liability Principle is about Protecting (Economic) Rights pursuant to Constitution

The first duty of government is protection the status of individual either the status of a freeman and a citizen, or the status that individual has substantive rights. Protection means that the laws recognize and secure an individual's rights to life, liberty and property. The most meaning of protection referred to the enforcement of rights when government gives specific ways in which government prevent violations of substantive rights, or redress and punish such violations.[326]The protection is including to protect substantive economic rights belong to every citizen[327]. Substantive economic right is recognized as natural rights belong to every citizen that is granted in constitution of a state.[328] Meanwhile the concept of protection genuinely derives from constitutional commitment from government to their citizens.[329] It

[326]Heyman, Steven J., (1991), 'the First Duty of Government Protection Liberty and the Fourteenth Amendment', *Duke Law Journal*, Vol. 41, pp. 508-570.

[327]Macklem, Patrick, (1997), 'Aboriginal Rights and State Obligations', *Alberta Law Review*, No. 35, pp. 100. Macklem refer to the concept that economic right is recognized for many years as transformation of positive rights belong to every individual. From international perspective, it becomes the basic notion of the Universal Declaration of Human Rights to protect a wide range of social and economic rights. Universal Declaration on Human Rights proclaimed that everyone has a right to work, to free choice of employment favorable conditions to just and employment, right to equal pay for equal work, right to form and to join trade unions for protection and more broadly the Declaration gives everyone a right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services and the rights to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. See article 22 and article 23 (1) *Universal Declaration on Human Rights 1948* (UDHR). See also Young, Katharine G., (2012), *Constituting Economic and Social Rights*, Oxford University Press – Oxford/UK, pp.2-19. See also Chapter II.

[328] For example the first concept of natural right is promulgated in Pennsylvania Constitution in 1776, "That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety. Source from; 'Pennsylvania Constitution of 1776, Declaration of Rights, Article VIII', reprinted in William F. Swindler (ed.), (1973-1979), *Sources and Documents of the United States Constitutions, 10 Volumes*, Dobbs Ferry, Oceana Publications – NY/USA, pp. 278. In Addition to natural rights, Representative William Lawrence in the Thirty-Ninth Congress over the Fourteenth Amendment and the Civil Rights Act of 1866, explained that "the necessary incidents of absolute rights included such rights as the right to make and enforce contract, to purchase, hold and enjoy property, and to share the benefit of laws for the security of person and property." See Maltz, Earl M., (1985), 'The Concept of Equal Protection of the Laws – A Historical Inquiry', *San Diego Law Review*, No.22, pp. 499. The U.S. adopted the concept of protection of economic rights as natural right into Amendment Fifth and Bill of rights. The Charter of Fundamental Rights of the European Union recognizes economic right in Article 15 (Freedom to choose an occupation and right to engage in work), Article 16 (Freedom to conduct a business) and Article 17 (Right to property). See also Petersmann, Ernst-Urlich, (1998), 'From the Hobbesian International Law of Coexistence to Modern Integration Law: the WTO Dispute Settlement System', *Journal International Economic Law* Vol. 1, pp.175-198.

[329]Keynes, Edward, (1996), *Liberty, Property and Privacy : Toward a Jurisprudence of Substantive Due Process*, The Pennsylvania State University Press – Penn/USA, pp. 86

refers to general idea of the obligation of a state to protect its citizen, posited by John Locke. Locke emphasized that the consent of free individuals to enter into society and establish government is for the preservation of their natural rights, thus, because government is established for this purposed, it is an obligation to secure every individual's life, liberty, and property.[330]

The economic rights concept is adopted by almost all modern constitution today,[331]this also endorses government to provide rule of law regarding right to pursue economic interest, such as right to property, right to make contract, to sell, to hold and convey real to inherit, to purchase and to full and equal benefit of all laws.[332] The economic rights basically have a dual function, first, this right serves as basis for entitlement of an adequate standard of living, and second, it is a basis of independence and freedom.[333]Eide mentioned that the original concept of economic right derives from the idea of John Locke about property right. "John Locke gave initial concern about property right was directed against feudal and order where control over land and other resources were based on hierarchical system constituting profound inequality and dependencies. It is understandable that the right to property become crucial

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[330] Locke, John, (3d 1698), *Two Treatises of Government: Critical Edition with an Introduction and apparatus criticus*, ed. Laslett, Peter, (1988), Cambridge University Press – Cambridge/UK, pp. 131. John Locke theory was increasingly recognized in national laws following the English, American and French revolutions and the English *Habeas Corpus* Act of 1679.

[331]Sunstein, Cass R., (2005), 'Why Does the American Constitution Lack Social and Economic Guarantees?',*Syracuse Law Review*, Vol. 56, No. 1, pp. 1-17. Sunstein gave example of some Constitutions which followed economic rights according to UDHR. Many modern constitutions follow the UDHR in creating social and economic rights they guarantee citizens a wide range of economic and social entitlements. For example, the Romanian Constitution includes the right to leisure, the right to work, the right to equal pay for equal work and measures for the protection and safety of workers. The Syrian Constitution proclaims that the state undertakes to provide work for all citizens. The Constitution of Norway imposes on the state responsibility to create conditions enabling every person capable of work to earn a living by his work. The Bulgarian Constitution offers the right to a holiday, the right to work, the right to labor safety, the right to social security and the right to free medical care. The Hungarian Constitution proclaims that everyone who works has the right to emolument that corresponds to the amount and quality of the work performed. The Constitution of Peru announces that the worker is entitled to a fair and adequate remuneration enabling him to provide for himself and his family material and spiritual well-being.

[332]For example Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified at 42 U.S.C. §§ 1981-1982 (1988)). The second bill of the Civil Rights Act of 1866, Section 1 declared that " all persons born in the United States were citizens of the United States and provided " shall have the same right in every state and territory in the U.S. to make and enforce contract, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property." See also Stephen Jr., Otis H., and Scheb II, John M., (2008), *American Constitutional Law (Vol. II) : Civil Rights and Liberties*, Thomson Wadsworth Publisher – Ohio/USA, pp. 22-26.

[333]Eide, Asbjorn, (2001), 'Economic, Social and Cultural Right as Human Right', in *Economic, Social and Cultural Rights: A Text Book (Second Edition)*, eds. Eide, Asbjorn, Krausse, Catarina, and Rosas, Allan, MartinusNijhoff– Leiden/Netherland, pp. 21-22.

element in the early quest for freedom and quality, because it has to be supplemented by at least two other rights, the right to work which can provide income and at the end it will be ensuring an adequate standard of living."[334]Accordingly, from the idea of John Locke in regard with the rights of citizen, and refer to the concept of first duty of government to protect the right of citizen, state creates the concept of civil protection.[335] In one sense, civil protection might be viewed as merely procedural, consisting of the right to bring lawsuit, but according to Blackstone, the civil protection is also deemed as right to remedy.[336] Blackstone's Commentaries underlined that the right to civil protection was substantive, not merely procedural or formal to ensure that individual were actually able to obtain remedies for the invasion of their rights by others.[337]In regard with the invasion or violation of substantive right, (such an economic right), the right to remedy should also be implied for the violation of economic right which is conducted by government.[338]

John Locke also qualified the term of protection of rights is to render to court for any violation of right conducted by government,[339] where the idea of state liability principle derives from justification of the obligation of government to protect rights of citizen. In this regard, state liability is an important measure to avoid injustice and unlawful conduct which is done by government, and also to rehabilitate the damage because of the violation. The right of remedy thus is one of vital dimension on establishing the state liability, once the government

[334]*Ibid*, see also Simmons, A. John, (1992), *The Lockean Theory of Rights*, Princeton University Press – NJ/USA, pp. 62-102

[335]Heyman, *Supra Note* 236, pp. 508-570. Common law tradition recognized three different concepts of protection, self -protection, civil protection and criminal protection. See also Mountjoy, Shane, (2009), *Marbury V. Madison: Establishing Supreme Court Power*, InfoBase Publishing – NY/USA, pp. 110. Chief Justice Marshall in Marbury v. Madison case, "the very essence of civil liberty certainly consists on the rights of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford the protection."

[336]Blackstone, William, (1803), *Commentaries on the Laws of England in Four Books, Vol. 1*., ed. Lewis, William Draper, Reprinted in 2007, The Lawbook Exchange Ltd. – NJ/USA, pp. 233.

[337]*Ibid*, a central purpose of Blackstone's *Commentaries* was to show that the common law accorded with the law of nature in recognizing fundamental rights, and gave a remedy for all invasions of those rights.

[338]Locke, *Supra Note* 330

[339]*Ibid*, Section 208. *Fourthly*, "But if the unlawful acts done by the magistrate be maintained (by the power he has got), and the remedy which is due by law, be by the same power obstructed; yet the *right of resisting*, (…) if it reach no farther than some private men's cases, though they have a right to defend themselves, and to recover by force what by unlawful force is taken from them; yet the right to do so will not easily engage them in a contest (emphasized added)."

violates the economic rights of citizen, the government is obliged to rehabilitate the damage through the implementation of state liability principle.[340]

Refer to argument of Fuke that "in the broadest concept of state liability means that state should make compensation for whatever loss or/and injury which it has to be deemed caused directly or indirectly and mentally or materially to its citizen."[341]It thus relates to the concept that the prominent functionof state liability is to rectify or to compensate the damage suffered by citizen.

2.2.2. State Liability Principle is about Compensation

When right is violated, it gives rise a justiciable claim that violated rights demand for rectification or compensation. A morally adequate from rectification is either restoring precisely what was lost that is equivalent in values or restoring the position of victim of violation. The rectification and compensation in the framework of economic rights serve to restore to individuals to the extent possible their capacity to achieve the ends for their economic values.[342] There are thus two theories of compensation. First is the theory of state with substitute liability. This theory holds when the government employee is wrongfully conducting their duties on behalf of state, individual is possible to file sue against them, however, the compensation can be paid by government due to financial disability of the employee. The second is theory of a state with its own liability. This theory is implied when a state engage in providing public service to fulfill public duties, but the risk of infringing the right and benefit of the people is unavoidable. Hence, the government bears responsibility to compensate the damage.[343] The theory of compensation derive from the central elements of negligence law in general, regarded not as indirectly furthering some independently

[340]Refer to The maxim of *UbiiusIbiRemedium* is known as general fundamental notion of liability doctrine in any manner of infringement of rights. See Broom, Herbert, (1845), *A Selection of Legal Maxims: Classified and Illustrated*, T&J.W. Johnson Bookseller – Philadelphia/USA, pp.91-98. The maxim *Ubiiusibiremedium* is often used by the court to imply state liability, where the purpose of remedy is to stop the breach of a legal norm and undo its detrimental effects or to put it in different way. For example in European Member state liability where the national court must in principle provide a remedy for the protection of EU citizens rights, and offer each individual the opportunity to assert rights derive from EU Law. See Tridimas, Takis, (2001), 'Judicial Review and the Community Judicature: Towards A New European Constitutionalism?', in *Principle of Proper Conduct for Supranational State and Private Actors in the European Union: Towards a Ius Commune*, eds. Woulters, J., and Stuyck, J., Intersentia Publishing – Antwerp/Belgium, pp. 77-78.

[341]Fuke, Supra Note 316

[342]See Shelton, Dinah, (1999), *Remedies in International Human Rights Law*, Oxford University Press – Oxford/UK, p. 40-41.

[343]Fuke, *supra note* 316

identifiable combination of goals, but as categories that mark an immediate normative connection between what the defendant has done and the plaintiff has suffered.[344]

State liability should also be understood in the context judicial remedies in the civil society from which the state has long been alienated, and of public law remedies in the days of the administrative and welfare state.[345]In this sense, court generally has the power to declare the rights, status and other legal relations whether or not the rights have been violated. In conclusion, the characteristic of state liability principle is protecting individual right from unconstitutional act conducted by government which is causing damage, and the function of state liability is to rectify and to compensate the damage cause to individual.

The following section in this research continue to discuss the practice of state liability in two different countries, the EU and the U.S., in order to answer to what extent is state liable to rectify the damage that is causing the infringement of individual's right, and what is the condition for implementation state liability in the EU and the U.S.

3. Theoretical Overview of State Liability Principle in the European Union and the United States of America

3.1. State Liability Principle in the European Union

The European Union recognizes Member State liability and liability of EU Institutions (EU Liability). The Member State liability is implying for damages arising against Member States for breaches of EU Law, meanwhile EU Liability claims is arising against the EU Institutions.[346]Liability principle in EU may be contractual or non-contractual. Contractual liability arises from the breach of contract for any reason whatsoever.[347] On the other hand, non-contractual liability arises out of damage caused to another. In the case of non-contractual

[344]Weinrib, Ernest J., (1987), 'Causation and Wrongdoing', in Symposium on Causation in the Law of Torts, *Chicago-Kent Law Review* Vol. 63, pp. 407 – 450.

[345]Fuke, *Supra Note* 316

[346]Horspool, Margot and Lumphreys, Matthew, (2012), *European Union Law (Seventh Edition),* Oxford University Press – Oxford/UK, p. 266

[347]EU recognizes action for contractual liability, namely liability arising out of contracts concluded between the EU and a third party or/and individual, who are subject to particular rules, and the European Court of Justice intervenes only if provision is made for this by a specific clause of the contract. The conditions and methods of action for liability are derived from the applicable law. This law is defined by the contract, and is in principle a national law. According to Article 340 (1) TFEU, the contractual liability of the EU shall be governed by the law applicable to the contract in question. See Berry, Elspeth, Homewood, Matthew J, and Bogusz, Barbara, (2013), *EU Law: Case, Text and Materials,* Oxford University Press – Oxford/UK, pp. 264. See also Heukels, Ton, (1997), 'The Contractual Liability of the European Community Revisited', in *The Action for Damages in Community Law*, Eds. Heukels, Ton and McDonnel, Allison, Kluwer Law International – The Hague/ Netherlands, pp. 89 – 107.

liability, the applicant will not be seeking the annulment of measures but only for compensation from the damage.[348]Article 340 TFEU concern to liability based on fault,[349] which theoretically encompass systematically list of substantive condition for the liability of Member States and the EU Institutions. Prior to discuss about liability of EU Institutions, a brief explanation about Member State liability will be discussed below in order to elaborate the distinction between Member State liability and EU Institution liability.

3.1.1. Member State Liability in the EU

Member State liability for wrongful act or culpability may comprise conducted by primary legislation, enacted by parliament, or secondary legislation in the forms of executive acts.[350]This is relevant with the obligations of all branches of a state whether it is legislative, judicative or executive. They have an important role to play in the application and execution of EU Law within a Member State. Accordingly, a Member State is liable for damage caused to individuals by a manifest infringement of EU law attributable to a supreme court of that Member State.[351]There are four types of sources of EU law that could be breached by a Member State, namely: Treaties, Regulations, Decisions and Directive.

First are treaties. They are the highest source of European law which creates some rights and obligations. Treaty provisions which are merely statements of intent or policy,

[348]Chalmers, Damian, Davis, Gareth and Monti, Giorgio, (2010), *European Union Law: Second Edition*, Cambridge University Press- Cambridge/UK, pp. 431. See also Von Bar, Christian, (2009), *Principle of European Law: Study Group on a European Civil Code, Non-Contractual Liability Arising out of Damage Caused to Another*, European Law Publisher GmBh – Munich/German, p. 229. However, Von Bar posited that non contractual liability in EU similar to the concept of tort law or law of tort in the Common Law system.

[349] Jacobs, Francis G, (2001), 'Some Remarks on Community and Member State Liability', in *Principles of Proper Conduct for Supranational, States and Private Actors in the European Union: Towards a Ius Commune*, Eds. Wouters, J., Stujck, J. and Kruger, T, Intersentia Publisher – Antwerp/Belgium, pp. 130-132.In terms of definition of fault, Francis G Jacob remarked that "the degree of fault is required at a broad level of generalization. French law seems more ready to give compensation even under some circumstances in the absence of fault. German law seems more restrictive, English law extremely so, requiring a very high degree of fault. On the other hand, French law has perhaps been more restrictive that English law when it comes to the amount of damages awarded. Then there are great differences between national systems on such basic questions as the existence of liability for legislation. All of these differences are unsurprising when it is borne in mind that in some system liability of the public authority has been modelled on private law, while in other systems such liability has been fashioned as an independent body of law. Moreover the private law systems themselves differ radically between the member states."

[350]Rebhahn, Robert, (2008), 'Non Contractual Liability in Damages of Member States for Breach of Community Law', in *Tort Law of the European Community, Tort and Insurance Law, Vol. 23*, eds. Koziol, Helmut, and Schulze, Reiner, SpringerWien – New York/USA, pp. 182.

[351]Kaczorowska, Kalina, (2011), *European Union Law* (Second Edition), Routledge Publisher – London/UK, pp. 112

rather than establishing clear rights or duties, require detailed legislation to be made before they can be enforced in the Member States. Second are Regulations which are the most important form of EU acts. They ensure uniformity of solutions on a specific point of law throughout the EU. Regulations apply *ergaomnes* (in relation to everyone) and simultaneously in all Member States.[352] Third are Decisions. Unlike regulations, Decisions have no general scope of application unless addressed to a particular Member State or to any legal or natural person or they may have no addressees.[353] Fourth is Directive. In contrary to treaty provisions, regulations and decisions, a Member states can breach EU law in legal implementation issues by failing to transpose an EU Directive timely or correctly into national law.[354] Although a Directive is used to harmonize national legislation, regulation and administrative provisions, but it depends on the national authorities to choose the form and method to imply it. It concerns the autonomy of national institutional and procedural systems while imposing upon a Member States the obligation to achieve a necessary result. It thus establishes the same legal regime in all Member States with regard to the relevant matter.[355]

The following sub section discusses the condition for Member State Liability which is clarified by the decision of ECJ.

1) Illegality or violation/breach of rule of EU law.

The principle of liability is implied when a member state infringed the EU Law whether a member state does not implement the rules or negligence of them. *Francovich* case is dealing with the damages caused to an individual by the non-implementation of a directive that basically lack of direct effect. In this case, Italy failed to implement the directive 80/987 relating to the protection granted to employees in the event of the insolvency of their employment. Italy considered negligence since it did not implement the directive during the required period of time. Although the provisions of the directive were sufficiently precise and unconditional, the Directive did not define the persons obliged to pay the guaranteed sums, thus the employees could not rely on the direct effect of the directive against the defaulting

[352] Article 288 TFEU defines regulations in following terms: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."

[353] Article 288 TFEU defines the effect of Decision, which states that "A decision shall be binding in its entirety. A decision which specifies those to whom it is addressed shall be binding only on them."

[354] Roosebeke, Bert Van, (2007), *State Liability for Breaches of European Law: An Economic Analysis*, Gabler edition Wissenschaft- Wiesbaden/Germany, pp. 15-16.

[355] Article 288 TFEU defines that "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

state. In this case, there was not vertical direct effect due to insufficiently precise provision of the directive. The Court in *Francovich* case more generally established the principle of liability of the state for negligence or non-implementation of EU Law, although the court regardless the conditions under which the state could be held liable other than in the specific case of the non-implementation of a directive.[356]

2) The relevant rule of EU law breached is one which is intended to confer rights on individuals.

A certain measure leads to liability principle is when a state is infringing the individual rights that lays down in the EU rules. In *Francovich* case, the judgment of it acknowledged that the full effectiveness of EU rules would be impaired and weakened the protection of individuals' right if the redress for protecting rights is unavailable by the member states. The court has interpreted the principle of state being liable for loss and damage caused to individuals that was in fact, "the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of EU law for which the State can be held responsible is inherent in the system of the Treaty".[357]In this context, the European Judge shall prescribe for the national judge the implementation in its domestic law of a general principle of liability of the Member States for all kinds of breaches of EU law.

The principle of state liability is applied whichever organ of the state by its act or omission was responsible for the breach, as a consequence from the fundamental requirement of uniformity that EU law is applied. All state authorities, including the legislature and judicature were bound to comply with the EU law which directly governed the legal position of individuals.[358]In some other cases such as *FacciniDorivsRecreb*[359] and *El Corte InglésvsBlàzquezRivero*[360], court stated, "EU law requires the Member States to make good damage caused to individuals through failure to transpose a directive, provided that three

[356]Francovich Case *Supra Note 15*. See also Weatherill, Stephen, (2012), *Cases and Materials on EU Law*, Oxford University Press – Oxford/UK, pp. 143. The judgment in Francovich created a remedy defined by criteria under EU law which must be absorbed into the national legal order.

[357]Nassimpian, Dimitra, (2007), '... And We Keep On Meeting: (De) Fragmenting State Liability', *European Law Review, Vol. 32*, pp. 821

[358]Emiliou, Nicholas, (1996), 'State Liability Under Community Law: Shedding More Light on the FrancovichPrinciple?',*European Law Review* Vol. 21 No.5, pp. 10.

[359]Case C-91/92 *FacciniDorivsRecreb* (1994) ECR I-3325, (1995) & C.M.L.R. 665.

[360]Case C-192/94 *El Corte Inglés v. BlàzquezRivero* (1996) ECR I-1281; (1996) 2 C.M.LR. 507.

conditions are fulfilled. First, the purpose of the directive must be to grant rights to individuals. Second, it must be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, there must be a causal link between the breach of the State's obligation and the damage suffered." Thus, the purpose of the directive is also well-examined to conclude whether it is granting rights to individuals, and whether it is possible to identify the contents of those rights on the basis of the provisions of the directive.[361] In terms of relationship between a directive and individual rights, directive may produce direct effect in vertical effect against state.[362] In other way, the horizontal direct effect which a directive might also define rights, in the case when individuals were able to assert against other individuals.[363]

Another case identify as breach individual's right is paramount in the *Brasserie du Pêcheur*case, when the plaintiff was obliged at the end of 1981, to stop its exports of beer to Germany, as the German authorities had considered that the exported beer did not comply with the German legal requirements on beer purity (due to additives) and that it could not be marketed under the same name of "bier".[364]According to ECJ's judgment, the German law composed measures having an effect equivalent to quantitative restrictions on imports as it is required in Article 30 TEC.[365] Furtherance, the Brasserie du PêcheurCompany continued to bring an action in the *Bundesgerichtshof* (German Federal Court of Justice), to seek compensation over the damage suffered between 1981 until 1987 because of the prohibition of importation.[366]Nevertheless, the German Government claimed that a right to damages could only be created by legislation. The ECJ responded that the Court has classification of the extent of the member state liability to judicial interpretation, rather than a brand new

[361]FrancovichCase, *Supra Note 15*

[362]Case C-271/91 Marshall *v Southampton and South West Area Health Authority II*, (1993), ECR I-04367. Case regarding right to compensation in the event of discrimination.

[363]*Ibid*, in Marshall Case, the Court has ruled that according to Art. 189 EEC Treaty, the binding nature of a directive constitutes the basic possibility in relying on the directive before a national court. It could exist only in relation to each Member State to which is addressed. It follows that a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon another individual.

[364]Case 148/84, *Deutsche Genossenschaftsbank v. SA Brasserie du Pêcheur*, (1985), ECR *1981*at 897**.**

[365]Case 178/84, *RE Purity Requirements for Beer: EC Commission v. Germany*, (1987) E.C.R. 1227, 1 C.M.L.R. 780 (1988)

[366]*Ibid*

creation of rights. And state liability supposed to be developed widely by the national court.[367]

3) The breach is sufficiently serious

The ECJ has commented regarding the criterion of sufficiently serious breach in the *Brasserie du Pêcheur*and*Factortame* case[368] when the national court must take account of all the factors that is characterizing the situation placed before it. As in the *Brasserie du Pêcheur*/*Factortame*judgment, the Court mentioned that "the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or EU authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a EU institution may have contributed towards the omission and the adoption and retention of national measures or practices contrary to EU Law." In sum, ECJ conclude that if the breach took place in an area where the Member State enjoys considerable freedom of action, the liability then will only arise when the circumstances under the national authorities acted. The implication of their conduct was intentional and inexcusable due to the degree of clarity and precision of the provision infringed.

4) Causal link between the breach and the damage suffered by individuals

The last condition of EU member state liability is causal link between the breach and the damage suffered by individuals. The lack of implementation or fault or even negligence of the EU rules of law is not definitive criteria for establishing causality in Member State liability. In *Brasserie du Pêcheur and Factortama*Case, the court remarked that "it is up to national court to determine whether there is a direct causal connection between the breach of EU law and the damage".[369] National courts usually deny the causal link between the damage and the breach of its public authority to EU Law, such as when a connection is not direct, immediate and exclusive, with the concurrence of any circumstances, it is thus resulting the

[367]Arnull, Anthony, (1999), *the European Union and its Court of Justice*, Oxford University Press-Oxford/UK, pp. 172.

[368]Joined Case C-46/93 and C-48/93 *Brasserie du Pêcheur SA, 1 C.M.L.R. v. FederalRepublic of Germany and the Queen v. Secretary of State for Transport ex parte Factortame Ltd and others*, (1996), ECR II31, paragraph 55; and Joined Cases C-178/94, C-179/94, C-188/94, C-189/94, C-190/94 Dillenkofer and Others v Germany [1996] ECR I-4845, paragraph 25.

[369]*ibid*

state is not liable.[370]In *Rechberger* case, the Court held that there was a direct causal link between the breach conducted by Austria and the damage. The breach was incorrect implementation of the Directive 90/314 on package travels, concerning the protection of consumers in the event of insolvency of the travel company. The consumer was suffering from the insolvency of the travel company, thus, the Court held that the protection of consumer is a direct causal link between the breach and the damage suffered by individual, and if a direct causal link has been established, a member state's liability cannot be precluded.[371] However, it should be noted that direct causal link must be examined by national courts according to national legal norms by taking in reference to the principle of effectiveness and equivalence. The principle of equivalence requires that under national procedural rules, claims based on EU law must not be treated less favorably than similar domestic claims, and the principle of effectiveness requires that the applicant of domestic rules and procedures must not render the protection of individuals' EU rights practically impossible or excessively difficult.[372]

3.1.2. EU Institutions Liability

In the case of violation conducted by the EU Institutions, the situation is a little bit more complicated, since the institutions themselves create the EU law. In terms to determine the violation, the ECJ requires a condition for liability that the EU Institution has violated a superior rule of law for the protection of the individual rights. In example, many provision in the Treaty direct relate to individual interest (e.g. Article 63 TFEU regarding of movement of capital); a hierarchically superior regulation (a regulation may relate to a prior network of regulations on the same topic); and general principles of EU law, such as principle of proportionality, legal certainty or legitimate expectations and principle non-discrimination.[373] The essence of superior rule of law mostly derives from the principles that are common to the

[370]Eritja, Mar Campins, (2006), 'Review the Challenging Task Faced by Member States in Implementing the Emissions Trading Directive: Issues of Member State Liability', in *EU Climate Change Policy: the Challenge of New Regulatory Initiatives*, Eds. Peeters, Marjan and Deketelaere, Kurt, Edwar Elgar Publishing – Gloss/UK, pp. 77.

[371]Case C-140/97, *Rechberger v. Republic of Austria* [1999] ECR I-3499.

[372]Kaczorowska, Kalina, *Supra Note 351*

[373]Rebhahn, Robert, *Supra Note 350*, pp. 189. In this context, the ECJ does not mention the background of law constitutes as superior rules of law. Superior sometimes seems to be equated with 'important, and sometimes with a more formalistic conception of one rule being higher than another. According to Rebhahn, this uncertainty certainly reflects a lacuna in the systematic order of Community law. See Case 24/82*Martin Peters Bauunternehmung GmbH v Zuid Nederlandse Aannemers Vereniging* (1983) ECR 0*987.*

laws of the Member States, issues of liability and causation may not be common, but the ECJ has drawn on principles of tortuous liability within the Member States to formulate its own principles governing liability in EU law.

3.1.3. Condition for EU Non-contractual Liability

Non-contractual liability exists inherently relate to three basic elements. First, the illegality or a wrongful act or omission conducted by institution, second, the claimant has suffered damage, and third, there is a causative link between the act of omission and the damage suffered. These three basic elements are supposed to link to each other in order to achieve the formalism of compensation due to the damage according to Article 340 (2) Treaty of Function of European Union (ex-Article 288 (2)of TEC), states that:

"*In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties."*

The liability of EU Institutions can be determined in two different measures in question, namely administrative and legislative acts. Administrative acts may be defined as those acts by which the administration applies general rules in individual cases, or otherwise exercises its executive powers in individual manner. Liability can also be incurred as a result of failures of administration or the negligence of employees of the EU Institutions in terms of performance their duties.[374] Legislative measures are mostly dealing with broad policy areas, such economic policy. It requires the institutions to make choices as to the way in which issue should be resolved. The majority of legislative measures involve choices of economic policy, since the institutions enjoy wide discretionary powers in all areas of activity. It is also possible for them to construe many measures in the context of TFEU.[375]

Both administrative and legislative acts are distinct by the court when court attempts to identify those situations where compensating individual applicants for the loss they have to suffered outweighs on general aims of the measure in question. The court however recognizes in certain conditions, even when dealing with the measures of general and

[374]Foster, Nigel, (2013), *Foster on EU Law (Fourth Edition)*, Oxford University Press – Oxford/UK, pp. 224. See also Grabitz, E., (1988), 'Liability for Legislative Acts*'*, in *Non -Contractual Liability of the European Communities*, eds. Schermers, H., Heukels, T., and Mead, P., Kluwer Law International- Hague/ Netherland, pp. 1-11.

[375] Woods, Lorna and Watson, Philippa, (2013), *Steiner & Woods EU Law*, Oxford University Press – Oxford/UK, pp. 306.

legislative application, an individual may have the right to compensation. In order to be entitled to such compensation, the applicant still needs to prove to the court the higher fault threshold and that the EU institutions have committed either illegality or a wrongful act or even lawful act but resulting a 'sufficiently serious breach' of their duties. However after the *Bergaderm* case occurred, the court made two important changes based on *Bergaderm* formula. First, the court abandoned the distinction between administrative and legislative acts, because the formula would apply to all EU Institutions regardless their nature. Second, the court dismissed the idea that a superior rule had to be infringed because according to the formula it was only necessary to show that the EU Institutions had breached a rule intended to confer individual rights.[376]

3.1.3.1. The Illegality or a Wrongful Act or Omission Conducted by the EU Institution

The concept of illegality or a wrongful act or omission conducted by institution is profoundly remarked in several EU Court decisions. The major judgment is in the case of *Schöppenstedt.* This case becomes a concept to test whether a sufficiently flagrant or serious violation of a superior rule of law for the protection of the individual right has occurred.[377] The *Schöppenstedt*case established formula in regard to the requirement of unlawful act. These requirements related to legislative measures where is generally relating to regulations, and practically any legislative measure that could be construed as economic in the context of the TFEU. The other requirement concerns of the general principle of EU law as superior rule of law. Hence, the *Schöppenstedt test* also required proof of breach of superior of law which is protecting individual rights, and the breach must be sufficiently serious, besides, there must be causation and damage.[378]

There are two important elements in the *Schöppenstedt*test, first the rule breached by EU Institutions must be superior rule, and second, the rule of law constitute as protection of the individual rights.

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[376]Case C-352/98P, *Bergaderm et.al. v. Commission*, (2000) ECR I-5291. See also Schutze, Robert, (2012), *European Constitutional Law*, Cambridge University Press – UK, pp. 280-281

[377]Case 5/71 *ZuckerfabrikSchöppenstedt v. Council* (1971), ECR 975. See also Kapteyn, P.J.G., (2008), 'Administration of Justice', in *The Law of the European Union and the European Communities*, eds. Van Themaat, Peter Verloren, and Kapteyn, P.J.G., Kluwer Law International – The Hague/ Netherlands, pp.476

[378] Hargreaves, Sylvia and Homewood, Matthew J., (2013), *EU Law (Third Edition)*, Oxford University Press – Oxford/UK, pp. 80-81.

1) Superior rule of law

In terms of construction the superior rules of law, at the top of the hierarchy are the Treaties and the Acts of Accession which constitutes the basic constitutional charter of the European Union. Beyond the Treaties, there is a series of quasi constitutional decision, such as the Decision on Own Resources or the Decision on the Direct Election of the European Parliament. Further, and on the same hierarchical footing as the Treaties and quasi-constitutional decisions, are the general principles of law, including fundamental rights, which constitute unwritten constitutional norms. The second level of the hierarchy contains rules of international law which permeate the legal order of the EU, including agreements and customary international law. The third level is acts of the EU institutions based directly on Treaty provisions. Finally, there are acts of EU institutions which seek to implement previous acts of the institutions.[379]

The EU liability principle emphasizes that both the Member State and EU Institutions are liable to compensate any damage for breach of a superior rule of law for the protection of individual right. Although in practice, there is no specific definition of what makes a rule of law 'superior' for this purpose, but it is implicit in the court case law that such rules tend to be a general principle such as fundamental rights or fundamental freedom.[380]For example, pursuant to The Charter of Fundamental Rights of the European Union (hereinafter EU Charter), EU recognizes economic right in Article 15 (Freedom to choose an occupation and right to engage in work), Article 16 (Freedom to conduct a business) and Article 17 (Right to property).[381] It is therefore interesting to note that breach any of these articles may entail liability for economic loss. Generally, since the EU law is primarily concern with economic matters, breaches of any EU law will typically result in economic losses, and compensability of these losses when caused by EU Institutions has been clearly set forth in Article 340 (2) TFEU.[382]

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[379]Case 294/83 *PartiEcologiste 'Les Verts' vs. European Parliament* (1986), ECR 1339, para.23. See also Craig, Paul, and Burca, Grainné de, (2011), *EU Law, Text, Cases and Materials (Fifth Edition)*, Oxford University Press- Oxford/UK, pp.103 - 118

[380] Scott, *Supra Note 181*, pp. 83. The compensation derives from principle of state liability for violating superior EU law is not about increase wealth of individual but more to help superior European law succeed and to eliminate unlawful nation laws.

[381] The Charter came into force with the Lisbon Treaty, which reformed the European Union. However, the Charter will not apply in full in the UK, Poland, or the Czech Republic.

[382] Case C-104/89 and C-37/90, *Mulder vs. Council of the European Communities* (1992), ECR 1-3061. See also Van Dam, Cees, (2013), *European Tort Law* (second edition), Oxford University Press – Oxford/UK, pp. 42-44

The relation between superior rule of law and protection of individual rights is vividly found in the context that the superior rule of law exists coherently with individual rights, when most of the law is created to protect rights. It lies down in the case of *Schöppenstedt.*[383] The court declared that "where legislative action involving measures of economic concern, the EU does not incur non-contractual liability for damage suffered by individuals as consequence of that action, by virtue of the provisions contains in Article 215 Treaty of European Community(hereinafter TEC) second paragraph (today is Art. 340 (2) of TFEU), unless a sufficiently flagrant violation of a superior rule of law for the protection of individual has occurred".[384] In the case of *Kampffmeyer*[385] when the court decided that is sufficient to show under general law of German Law (based on the German *Schutznormtheorie*[386]), the protection of individual right is more to wide interpretation. According to the Court, in order for an individual to be able to claim damages, the legal norm in question must be intended to protect not only individuals in general, but also the group of individuals to which the injury party belongs.[387] Thus, interpretation of Article 340 (2) TFEU, requires that liability of damage for the alleged breach of legislative acts by the EU is only available where the measure in question breaches a legal norms that protects the individual in general or group of individuals (corporation).

Regarding the type of EU legislation which is liable to give rise to a claim for damages is concerned with economy policy and involves the exercise by the political institutions of discretionary powers.[388]The Economy policy is including the regulations and decisions promulgated by the institutions which are considered breach the right of individual. For

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[383]Case 5/71 *ZuckerfabrikSchöppenstedt v. Council* (1971) ECR 975.

[384]*Ibid*,

[385]Joined Case 5,7, 13-24/66 *Kampffmeyer and others v. Commission* (1967) ECR 317.

[386] According to this theory, the state is liable only when, in addition to causing an injury, breaches a schutznorm, which is a legal norm protecting a subjective public right of injury party and which is intended not to protect individuals in general, but also to protect a specific circle of individuals which the party belongs to. The requirement of protection of specific individuals has often liberally interpreted. Scott, Sionaidh Douglas, *Supra Note*181, pp. 395

[387]*Ibid*.

[388]Schermers, Henry G. and Vaelbroek, Denis F., (2001), *Judicial Protection in the European Union* (Sixth Edition), Kluwer Law International – Alphen/Netherlands, pp. 1052. The article 288 (340 TFEU) requires that the action should always be brought against the relevant EU Institution or Institutions against the matter giving rise to liability is alleged. However, in practice, the Court has accepted actions brought not against the Union itself, but against the relevant Institutions.

example in *Schneider v. Commission* Case, Schneider and Legrand were two companies specializing in electrical distribution and low voltage who merged into a single company. The Commission declared the merger is incompatible with the common market and ordered a break up for the company. In 2002, the General Court (hereinafter GC, prior to the coming into force of the Lisbon Treaty on 1 December 2009, it was known as the Court First Instance)found the Commission decision to be illegal on two grounds. First, there were errors in its economic analysis of all the national markets other than the French market. Second, the Commission had failed to tell Schneider in sufficiently clear terms what measures it needed to take avoid the merger being declared illegal. The Court went on to find that there was liability according to Article 340 of TFEU. It was because the Commission had violated rights of these companies by not telling it what corrective action needed to take.[389]

In order to establish the non-contractual liability of the EU for damage caused by its institutions, the applicants must show that the economic loss they claims to have suffered is attributable to an act adopted by the defendant in its capacity as a EU institution.[390]Another example is the *HNL case*. In this settle case, the court was concern with an action for compensation concerning a Council regulation which provide for the compulsory purchase of skimmed milk held by the intervention agencies for use in feeding stuffs. The Court declared that, "to accept within reasonable limits certain harmful effects on their economic interest as a result of a legislative measure without being able to obtain compensation from public fund even if that measure has been declared null and void. In a legislative field such as the one in questions, in which one of the chief features is the exercise of a wide discretion essential for the implementation of the Common Agricultural Policy, the EU does not, therefore, incur liability unless the institution concerned has manifestly and gravely disregard the limit on the exercise of its power."[391]

There is authority for the proposition that the most general principles of law, and in particular all fundamental human rights should be considered as superior rules of law

[389]Case T-310/01, *Schneider Electric SA v. Commission*, (2002) ECR II-4071. The right confer to this case is the right is one of the fundamental rights guaranteed by the EU legal order in administrative procedures, is of particular importance for the control of concentrations between undertakings. See also Chalmers, Damian, Davies, Gareth, and Monti, Giorgio, *Supra Note 348*, pp. 434 – 436.

[390]Biavati, Paolo, (2011), *European Civil Procedure*, Kluwer Law International – the Hague/Netherland, pp. 53. The ground for the non-contractual liability of the EU based on legislative measures in that a sufficiently serious and manifest breach of a superior rule of law for the protection of individuals may be found. When EU institutions have no discretionary power, the mere transgression of the rule of law may be sufficient to found the liability.

[391] Join Case 83 & 94 /76, 4 and 15 & 40/77, *HNL vs. Council and Commission* (1978), ECR 1209, para 6.

protecting individuals. For example in Case *Nold v. Commission*, in this particular case, a new Commission decision required that the German national coal producer, *Ruhrkohle*, would sell only to large wholesalers on two year contracts. *Nold*, (a small wholesaler, who under the previous system purchased directly from *Ruhrkohle*) considered this to be violation of his right to property and his freedom to pursue economic activities. However, the Court reaffirmed its position that 'fundamental rights form an integral part of the general principles of law', the observance of which it ensures that it found no violation of such right in this particular case. It justified this by holding that rights of ownership do not protect mere commercial opportunities. In this case, the ECJ broadened the sources of inspiration when it came to ascertaining specific fundamental rights as forming general principles of law.[392]

General principles of law are more to the production of a rule of law and a rule not to be found expressly in the Treaty. Once the EU Courts have determined what the common heritage is, a general principle of EU Law may emerge. General principles must be detected, understood and recognized. They are not to be found in the statutory provisions. They are rather created and pronounced by the judge. In general, the Court will search for identify principles inspired by national law or international treaties ratified by all members states – with particular significance given to the European Convention on Human Rights. In an almost generic way, general principle of law constitutes principle of proportionality, legal expectations, equal treatment and good administration.[393]

Furtherance, it needs to explain, what is the superior of law for the protection of individual rights according to EU law? In this context, some cases are leading to reveal the concept of it.

2) The protection of individual rights

The ECJ recruited the meaning of 'rights' as protection of individual if the EU Institution has failed to observe certain standards inherent in the EU legal system, as it comes from superior rule of law.[394] In addition, the protection of individual rights was laid down in

[392]Case 4/73, *Nold v. Commission* (1974) ECR 491. See also Reinisch, August, (2012), *Essentials of EU Law* (Second Edition), Cambridge University Press – UK, pp. 101-102.

[393]Groussot, Xavier, and Lidgard, Hans Henrik, (2008), 'Are There General Principles of Community Law Affecting Private Law?', in *General Principles of EC Law in a Process of Development*, eds. Bernitz, Ulf, Nergelius, Joacin, and Cardner, Cecilia, Kluwer Law International – The Hague/ Netherlands, pp. 60 -61.

[394]Biondi, Andrea, and Farley, Martin, (2009), *the Right to Damages in European Law*, Kluwer Law International – the Hague/Netherlands, pp. 392.

several general principles of the Law of European Union.[395]The following are among grand principles that have been fall with the category protection of individuals' rights. Although the ECJ in some cases also recognized some other principles in the context of actions for damages, including the principle of the protection of acquired rights[396], the principle of non-retroactivity[397], the principle of care and of sound administration[398], and the principle of equal treatment in the award of public contracts[399], but the major principles are focusing on the principle of non-discrimination and the principle of equality, the principle of proportional, and the principle of legitimate expectation.

2.1) the principle of non-discrimination and principle of equality

Application to this principle was remarked by the ECJ in the case of *Sermide v. CassaConguaglioZuccheroand others*, when the Court noted that under the principle of non-discrimination between EU producers or consumers, the Article 40 TEC (now Article 46 TFEU) includes the prohibition of discrimination on grounds of nationality according to the Treaty.[400] In other cases, such *W. Ferrario and Others v. Commission of EC*, the Court stated the general principle of equality is one of the fundamental principles of the law of the EU civil service. The principle requires that comparable situation shall not be treated differently

[395] The European Union was established by the Treaty on European Union (Maastricht Treaty), Maastricht, Feb. 7, 1992, 12 U.K.T.S. Cm. 2485 (1994). It comprises three "pillars". The first pillar consists of the three European Communities: The Coal and Steel Community (ECSC Treaty) Paris,Apr.18, 1951, 261 U.N.T.S. 140; the Atomic Energy Community (EURATOM Treaty) Rome, Mar. 25, 1957, 298 U.N.T.S. 167 and the European Economic Community (EEC Treaty), Rome, Mar. 25, 1957, 298 U.N.T.S 11. The Treaty of Lisbon, Dec, 13, 2007, amends the EU's two core treaties, the Treaty on European Union and the Treaty establishing the European Community. The latter is renamed the Treaty on the Functioning of the European Union (TFEU). See, Mathijsen, P.S.R.F., (2004), *A Guide to European Union Law (Eight Edition)*, Sweet & Maxwell – London/UK, pp.12-23.

[396]Joined Cases 95 to 98/74, 15 and 100/75 *Union NationaledesCoopérativesAgricoles de Céréales and Others v. Commission and Council* [1975] ECR 1615.

[397]Case 71/74 *Nederlandse Vereniging voor de Fruit- en Groentenimporthandel v Commission* [1975] ECR 1095.

[398]Case T-231/97 *New Europe Consulting and Brown v Commission* [1999] ECR II-2401; Case T13/99 *Pfizer Animal Health v Council* [2002] ECR II-3305; Case T-285/03 *Agraz*[2005] ECR II-1063.

[399]Case T-145/98 *ADT Projekt*[2000] ECR II-387; Case T-160/03 *AF Con Management Consultants and Others v Commission* [2005] ECR II-981.

[400]Case 106/83, *Sermide v. CassaConguaglioZucchero and Others*, 1984 E.C.R. 4209. See also Case 139/77, *DenkavitFuttermittel GmbH v. FinanzamtWarendorf*, 1978E.C.R.para. 1317 1333; Case 106/81, *Julius Kind v. European Economic Community*, (1982) E.C.R. 2885, 291. In Sermide Case, the court also mentioned that comparable situation must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified.

unless such differentiation is objectively justified.[401] Thus, the linkage between the violation of individual rights and the liability of EU can be seen in the way the Court produced the ultimate statement in order to compensate the damage caused by the transgression of general principle of EU law. As it can be traced back to some cases, such as *Bayerische NHL*[402] and *Quellmehl*Cases that were recognized as case when the Court implied the requirement of infringement superior rule of law for protecting individual rights. The Court found that the Council had infringed the general principle of equality stated in Article 40 (3) TEC (Art. 46 TFEU).[403]

2.2) Principle of proportionality

It can be traced back to the previous cases based on old Article 215 of TEC (Article 340 TFEU), when ECJ held decision arise from the elaboration of this article in which relating to the requirement of *Schutznormtheorie*. In the first judgment of *Kampffmeyer* case, the Court elaborates upon the *Schutznorm*requirement in connection with Article 215 TEC. The Court found that the regulation of prices and aids in relation to durum wheat for the 1974/75 cereal marketing year constitute an infringement of the objective of stabilizing markets provided for in Article 39 (1) of the TEC which is assuring the availability of supplies (Art. 39 (1) (d) and ensuring that supplies reach consumers at reasonable prices (Art. 39 (1) (e)). On the other word, the principle that was violated was EU fair trade principle and the principle of proportionality.[404]

The principle of proportionality is not only for a limitation on exercise of EU competence, but it also considers being a valuable tool to protect interest of individual or Member States against excessive EU acts. According to this principle, the EU is not only entitled to exercise a competence but also to limit its scope and intensity irrespective of the

[401]Joined Cases 152, 158, 162, 166, 170, 173, 175, 177 to 179, 182 & 186/81, *W. Ferrario and Others v. Commission of the European Communities*, (1983) E.C.R. at 2367

[402]Joined cases 83 and 94/76, 4, 15 and 40/77,*Bayerische HNL and others v Council and Commission of the European Communities*, (1978), ECR 1209

[403]Case 262/78, *Diamalt AG v. European Economic Community*, (Quellmehl-Liability), (1982), ECR 3293.In the Quellmehl case, the ECJ held that the Council of the EU had infringed the general principle of equality by abolishing production refunds on maize used to make quellmehl and gritz while continuing to pay refunds on maize used in the manufacture of starch.

[404]*Kampfmeyer Case, Supra Note* 385. The superior of rule of law that was infringed is non-discrimination and proportional principles.

nature of the competence itself.[405] Principle of proportionality can be invoked not only as an interpretative tool, but also as a ground of judicial review.[406]For example in the case of *Artegodan GmbH*[407], the ECJ decided that the review of principle of proportionally and in accordance with the principle of sound administration must be balanced against the legally protected interests of the holders of marketing authorizations by taking account of all the circumstances of the case.

2.3) the principle of legitimate expectation

EU recognizes general principle of legal certainty which is a principle underpinning any legal system. This principle can be related to the demand that the application of the law to a specific situation must be predictable.[408]Legal certainty principle is intertwined with principle non retroactive and principle of legitimate expectation.[409]Principle non retroactive is a principle that prevents EU secondary legislation from taking effect before publication.[410] It thus governs the presumption that legislation should not be retroactive. However, retroactive is prohibited unless the measure may not otherwise be achieved. It provides a relation with principle of legitimate expectation.[411]Legitimate expectation is the principle that its root lays in the concept of good faith, and the administration should not fail to keep promise that is caused to individual suffers loss. It emphasizes that when administrative decision is cancelled

[405] Hartley, Trevor C., (2010), *the Foundation of European Union Law* (Seventh Edition), Oxford University Press-Oxford/UK, pp. 123. See also Tridimas, Takis, (2006), *The General Principle of EU Law*, Oxford University Press – Oxford/UK, pp. 175-176.

[406] See Case C-170/08, *Nijemeisland*, (2009), ECR I-5127, para. 40. See also Hofmann, Herwig C.H., Rowe, Gerard C. and Turk, Alexander H., (2011), *Administrative Law and Policy of the European Union*, Oxford University Press – Oxford/UK, pp. 129-132.

[407]See case T-429/05, *Artegodan GmbH* v. *Commission of the EU*, (2010), ECR II-494.

[408] Ratio, Juha, (2008), 'The Principle of Legal Certainty as a General Principle of EU Law', in *General Principles of EC Law in A Process of Development*, eds. Bernitz, Ulf, Nergelius, Joakim, and Cardner, Cecilia, Kluwer Law International – Alphen/Netherland, pp. 53-55.

[409] Ratio, Juha, (2003), *the Principle of Legal Certainty in EC Law*, Kluwer Academic Publisher – Dordrecht/Netherland, pp. 256.

[410] See Case 88/76, *Société pour l'Exportation des Sucres v. Commission*, (1977), ECR 709. Commission had passed a regulation on 30 June 1976 removing the right of exporters to cancel their export licences. The regulation was dated 1 July, the expected date of publication of the Official Journal. The journal did not appear until 2 July. The application applied for cancelation on 1 July but it was refused on the basis of the regulation. The ECJ ruled that the regulation did not come into force until 2 July as the date of actual publication.

[411] See Kent, Penelope, (2008), *Law of the European Union* (Fourth Edition), Pearson Education Limited – Essex/UK, pp. 80-81

or revoked, the EU Institutions must concern regarding they act which influence individual rights or benefits in economic activity. They also must be able to respond to changes underlying economic situation, when the economic actors do not have a vested right on the maintenance forever of the existing common organization of the market.[412]

General nature of legitimate expectations has been declared by the court. The courts have been prepared to hold that a clear representation by EU institutions is how they will act in the future or consistent practice in the past. It then shows whether they are capable in generating a duty to act in a particular way in relation to the recipient of the representation or the beneficiary of the practice. Legitimate expectation principle may arise when EU Institutions have discretionary power and it represents that it will exercise the power in a particular way. The Institutions may express this principle in the form of an explicit promise or statement, or they may be implicit in the form of a consistent practice from the past. This principle could also give rise to an enforceable legal right on the part of the individual who held such an expectation that EU Institutions will be required to give effect to it unless circumstances is entitled them to draw it back.[413]

Under the principle of legitimate expectation, EU measures must not violate the protection of legitimate confidence of those concerned, especially in the absence of overriding public interest. This principle is a foundation of a rule of interpretation as well as a ground for annulment of EU measure, but basically it is used more often for an action damages for non-contractual liability.[414] In the previous *CNTA vs. Commission case*[415], the court based on old Article 215 of TEC (Article 340 TFEU), decided that Commission had found guilty of wrongful act resulting ability to compensate damage. The Court as well decided that Commission has been proved to infringe the principle of legitimate expectation. This case becomes a milestone for any cases regarding to the infringement of principle of legitimate expectation which is resulting the non-contractual liability for EU institutions.[416]

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[412] See Larragan, Javier De Cendra de, (2011), *Distributional Choices in EU Climate Change Law and Policy: Towards a Principle Approach?*, Kluwer Law International – Alphen/Netherlands, pp. 153.

[413] Auburn, Jonathan, Moffet, Jonathan and Sharland, Andrew, (2013), *Judicial Review: Principles and Procedures*, Oxford University Press – Oxford/UK, pp. 20-24.

[414] Hartley, Trevor C.,(2007), *The Foundation of European Community Law* (sixth edition), Oxford University Press – Oxford/UK., pp. 149

[415]Case 74/74, *Comptoir National Technique Agricole (CNTA) SA vs. Commission of EU*, (1976), ECR 0797.

[416]*Ibid*.This case arose out of the system of monetary compensatory amounts (MCAs), which were intended to compensate for fluctuations of exchange rates. These payments had originally been granted on exports of colza seed from France, but on 26 January 1972, the Commission passed a regulation which abolished the

There are two categories of legitimate expectation, namely substantive and procedural legitimate expectation.[417] First is substantive legitimate expectation. Issues of substantive legitimate expectations typically arise when EU Institutions have led an individual to expect certain consequences either through the formulation of a particular policy or through sustained practice, but furtherance they change its policy or practice which is subsequently prevent individuals to obtain those expectations.[418] In *Mulder* case[419], Mulder a farmer undertook to cease producing milk for five years in return to premium. When he subsequently sought to resume production on the expiry of the 5 years period, he was refused a quota on the grounds that he had to have produced milk the preceding year in order to be eligible for a quota for the forthcoming year. This provision had, however, been introduced during the 5 years period and Mulder argued that it frustrated his expectation of re-entering the milk market. The ECJ proceeded to balance the general policy objective the EU was pursuing against Mulder's stated interest. While nothing that Mulder could not expect to re-enter the market under exactly the same previous conditions. The Court wrote that "the producer who has voluntarily ceased production for a certain period cannot legitimately expect to be able to resume production under the same conditions as those which previously applied and not be subject to any rules of market or structural policy adopted in the meantime. The fact remains that where such a producer, as in the present case, has been encouraged by the EU measure to suspend marketing for a limited period in the general interest and against payment of a premium he may legitimately expect not to be subject, upon the expiry of his undertaking, to restrictions which specifically affect him precisely because he availed himself of the possibilities offered by the EU provisions."[420]

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system as 1 February. The applicant was a French firm which had entered into a number of contracts before the regulation was passed, and these were to be performed after the ending of the scheme. It claimed that it had entered into the contracts on the assumption that MCAs would be payable and had calculated it price on that basis. It argued that it had suffered loss by reason of the sudden ending of the scheme without warning and without any provision being made for transactions which were in the process of completion when it came into force.

[417]Craig, P.P. (1999), 'Substantive Legitimate Expectations in Domestic and Community Law', *Cambridge Law of Journal* No. 55, pp. 306. Craig argued that since legitimate expectation principle is well established in EU Law, thus this principle does not to be classified as either procedural or substantive.

[418] Anthony, Gordon, (2002), *UK Public Law & European Law: The Dynamics of Legal Integration*, Hart Publishing – Oregon/USA, pp. 118

[419]See Case 120/86 *Mulder v. Minister van Landbouw en Visserij* (1988) ECR 2321

[420]*Ibid*, para 22-23

Second is procedural legitimate expectation. A procedural legitimate expectation relates to the procedure that will be followed by EU Institutions before they take a decision or acts. A legitimate expectation may give a procedural benefit when a decision will be taken and there is an opportunity to comment, a hearing before a decision is taken or consultation will be made before a decision is actually taken.[421]In the *France and France Télécom Case*[422], the GC found that, "it is settled law that, even in the absence of legislation, the right to rely on the principle of the protection of legitimate expectations extends to any individual where by giving him precise assurances, an institution has led him to entertain reasonable expectations. In whatever form they are given, precise, unconditional and consistent information from authorized and reliable source constitute such assurances. However, a person may not plead breach of the principle unless the administration has given him precise assurances. It follows from that principle which is especially applicable in relation to the review of State aid pursuant to Art 14 of Regulation No 659/1999 that the protection of the legitimate expectations of the recipient of the aid can be relied upon provided that the recipient has sufficiently precise assurance arising from positive action taken by the commission which leads him to believe that a measure does not constitute state aid for the purpose of article 87 TEC. If the Commission does not give an express opinion on a measure which has been notified to it, on the other hand, its silence cannot on the basis of the principle of the protection of the legitimate expectations of the recipient undertaking, preclude recovery of that aid."[423]In conclusion, the core of legitimate expectation is that the law should not be different from what could be expected. The EU Institutions are bound by a promise to act in a special way as a part of EU Law.[424]

3) The existence of sufficiently serious of breach

In order to define what constitute sufficiently serious of breach, the Court normally required evidence from the applicants of whether there having been a manifest and grave disregard by the institution for the limits on the exercise of its power.To some extent the court implies criteria regarding to the concept sufficiently serious of breach. The criteria are the clarity and the precision of the EU rule breached, whether the infringement was intentional or

[421]Auburn, Jonathan, Moffet, Jonathan and Sharland, Andrew, *Supra Note 413*

[422]Joined Cases T-427/04 and T-17/05, *France and France Télécom v. Commission*, (2009), ECR II-4322.

[423] Ibid, Para 259-261

[424]Chalmers, et al, *Supra Note 348*, pp. 412

accidental, whether any error was excusable, the degree of discretion enjoyed by EU institution concerned, the complexity of the situations to be regulated, and the difficulties in the application or interpretation of the relevant text.[425]In the P *Holcim (Deutschland)* case[426], the ECJ stated that, "the system of rules which the court has worked out in relation to the non-contractual liability of EU takes into account, *inter alia*, the complexity of the situations to be regulated, difficulties in the application or interpretation of the legislation and, more particularly, the margin of discretion available to the author of the act in question. The CFI (GC) took into account not only the defendant discretion but also the complexity of the facts and the difficulties on applying EU law in order to establish whether there had been a sufficiently serious breach of EU law. The criteria to which it had recourse to establish the existence of such a breach of EU law are therefore not vitiated by an error of the law."[427]

In summarizing the factors that contribute to the Court's finding of a sufficiently serious breach, it could be identified three clear elements, whether the institution exercised its power in the way it did because of a higher public interest which justified the harm caused to individual interest, whether the harm caused by the exercise of discretionary power concerned a clearly defined group of individuals, and whether the individuals who have been harmed are expected to support the harm they suffered within reasonable limits.[428]

4) Actual link between the damage and the conduct of the EU institutions

The concept of actual link between the damage and the conduct of the EU Institutions seem to be important requirement. It must be shown sufficiently that the act of Institution caused the damage when the damage must be ascertainable.[429] The damage caused by the EU

[425]See joined case 116 and 124/77 *amylum v. Council and Commission* (1979) ECR 3497, Joined Cases 103 and 145/77 *Royal Scholten-Honig v. Intervention Board for Agricultural Produce* (1978) ECR 2037.

[426]Case C-282/05, *P Holcim (Deutschlan) AG v. Commission of the EU*, (2007), ECR I-02941.

[427] Ibid, para 50-51

[428] Van Geven, Walter, (1994), 'Non Contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a View to a Common Law for Europe', *Maastricht Journal of European and Comparative Law*, No. 1 Vol. 6, pp. 6-40.

[429]See Van Roosebeke, Bert, (2007*), State Liability for Breaches of European Law: An Economic Analysis*, DeutscherUniversitäts-Verlag | GWV Fachverlage GmbH, (DUV) – Wiesbaden/Germany, pp.117. The concept of non-contractual liability is that the action of the EU Institutions is not based upon contractual obligation, but upon its democratic legitimacy. The democratic state is thought of as a representative of all, and acting for all. But almost all legislation or acts by the state in general will inevitably harm at least some individual's interests.

institutions will be covering, *inter alia*, loss of interest[430], pure economic loss[431], lost profit on foreseeable contracts[432], penalties paid for repudiation of contracts[433], and non- financial loss such as physical incapacity[434].The damage suffered by the applicant must be actual and certain, regardless whether it is present or future. The court ruled that uncertainty regarding the exact quantification of damage would not preclude a finding that the damage alleged by the applicant was sufficiently certain. Thus, in a situation where the damage alleged is real and actual there is uncertainty as to the extent of damage, the condition relating to certainty of damage is satisfied.[435]According to the interpretation of Article 340 (2) TFEU, the damage must be a sufficiently direct consequence of the wrongful act of the institution, and the causality of the damage may often be 'direct, immediate and exclusive'. However, the losses suffered are normally of an economic nature and such losses are recoverable, so according to the court in the *Dumortier Frères vs. Council* case[436], that the losses should be certain and specific but not speculative. In *Ireks-Arkady* case, Advocate General Capotorti stated that damage should cover both a material loss, a reduction in a person's assets, and also the loss of an increase in those assets which would have occurred if the harmful act had not taken place. These three conditions governing the EU institution liability must be satisfied, but if one of conditions is not fulfilled, the applications is dismissed in it is entirety without the necessity for the court to examine the remaining conditions for such liability.[437]

3.1.3.2. Liability for the absence of unlawfulness act

Liability for the absence of unlawfulness act is a new plea in EU law which must be raised in the application. Unlike the application for unlawful act, the EU Institution is liable

[430] See case 238/78, *Ireks-Arkady v. Council and Commission* (1979) ECR 2955.

[431]See C-37/90, *Mulder II* (1992) ECR I-3061.

[432] See Joined Cases 5/66, 7/66, *Kampfmeyer v. Commission* (1967) ECR 245; Case 74/74 *CNTA v Commission* (1975) ECR 533.

[433]Kampfmeyer v Commission, *ibid*

[434]Case 308/87, *Grifoni v Commission* (1990) ECR 1203.

[435] Case C-243/05 P, *Agraz, SA and others vs. Commission of European Community*, see Kaczorowska, Alina, (2011), *European Union Law* (Second Edition), Routledge – NY/USA, pp. 479

[436]Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 P.,*Dumortier Frères SA and Others v. Council of EC* (Maize gritz – Exchange rate applicable to damages).

[437]See case *Ireks-Arkady v. Council and Commission*, Supra Note 430

for damages caused by a lawful act. It does not require the applicant to show fault on the part of the EU, and it does not necessary for the Court in its ruling to investigate whether the institution has breached its duty. The applicant requires demonstrating the special or unusual damages due to the act of institution. With regard to the substantive elements of a claim based on lawful acts, the Advocate General Mayras in the case of *Compagnied'Approvisionement v. Commission*[438]addressed the special damage that must be particular to one or more persons, and it must be so serious as to exceed the duties imposed on each citizen by the requirements of life in the EU.[439] The foundation of claim of EU Institution liability for the absence of unlawfulness, refer to the principle of public burdens (principle *d'egalitédevant les charges publiques*), and thereby amounts to the imposition of the concept of strict liability.[440]

There are some requirements for the liability of the absence of unlawfulness act such an actual damage which must also be special and unusual. The special damage normally is disproportionate impact on a particular circle of economic operators and the unusual damage is usually going beyond the limits of the normal (entrepreneurial) economic risks inherent in operating in the sector concerned.[441]Similar to liability for unlawful act, the EU Institution is liable if all the conditions, such as breach superior of law for protection individual rights, the existence of serious of breach and actual link between damage and the conduct of EU Institution are fulfilled. Thus, as the cumulative nature of those conditions means that if one of them is not satisfied, the EU cannot incur non-contractual liability in respect of a lawful act of its institutions.

In the context of condition for non-contractual liability, the EU courts establish the same conditions both for EU Institutions and the Member State. However, there are two distinctions between liability of member states and liability of EU Institutions. First is liability for wrongful or negligent that is implemented by national authorities. In the case of

[438]Joined Cases 9 and 11/71, *Compagnied'Approvisionment v. Commission* (1972) ECR 391.

[439]*Ibid*, this case arose out of the devaluation of the French franc in 1969, which caused the Council to decree that the France should grant subsidies for imports of cereal products from the Member states and third countries. The devaluation of the French franc meant that the subsidy did not precisely compensate for the resulting price increase, therefore, the French traders and producers of cereals, brought an action for damages due to the treatment less favorably than importers from other member states. They claimed that the Community should incur the liability, even though the amount of the subsidies had been legally fixed, but they had suffered unusual losses due to lack of compensation of devaluation of price.

[440] See the case 59/83 *Biovilac v. EEC* [1984] ECR 4057.

[441]See case Case C-237/98 P *Dorsch Consult v Council and Commission*[2000] ECR I-4549; [2002] 1 CMLR 41

Granaria,[442] the ECJ held that the question of compensation for loss incurred by individuals caused by a national body or by agents of the Member States that is resulting from either the infringement of EU measures or an act and omission contrary to national law while applying EU law, is not covered by Article 340 (2) TFEU. It has to be assessed by national courts according to the national administrative law. However the requirements of the principle of non-contractual liability must be respected. Second is liability of national authorities in the case of correct application or implementation of EU measures, but damage occurs. In this case, the EU Institution who issues the measure is liable for damage, exceptionally in respect of actions concerning monetary compensation, for example in *Haegeman v. Commission*[443], the ECJ held that for the applicant the proper forum was in a national court, as the payment were collected by national authorities and thus the applicant was in a direct relationship with them, not with the council. If a measure is declared void by the ECJ, a national court will award compensation for the total damage suffered by individuals. The sum awarded will be paid from national funds but national authority can obtain reimbursement from EU funds.

EU Liability focuses on the infringement of individual's right when the court significantly refers to the violation of superior of law accorded to protection of individual rights. The European Courts in their decision mostly emphasize the infringement of provision that is meant to protect rights, position or interest of the individual, such as fundamental rights and general principles.[444]

From the explanation above, it can be concluded that the protection of individual right become a prominent condition in order for EU Courts to hold a decision in regard with application of non-contractual liability in EU. Significantly for liability of EU institution, economic right is enshrined in EU liability principle where the EU Institutions are liable to rehabilitate and to rebalance the right that is violated by their acts. The liability in this context refer to the duty of government in order to protect the right of individual derives from superior of law. Henceforth, the EU Institutions have obligations to protect, to rehabilitate and to rebalance again the right that is violated by their legislative acts.

[442]Case 101/78 *Granaria* [1979] ECR 623.

[443]Case 96/71 *Haegeman v. Commission (*1972) ECR 1005.

[444]Thies, Anne, (2013), *International Trade Dispute and EU Liability*, Cambridge University Press-Cambridge/UK, (Kindle Cloud Reader), Location 2159-2160. See also Case T-193/04, *Hans Martin Tillack v. Commission*, para. 121. The GC in this case referred to the protection of family life, the freedom of the press, the principle of the presumption of innocence and the right to a fair trial as fundamental rights conferring enforceable rights.

3.2. The United States of America

Unlike European Union, the U.S. law system recognizes state sovereign immunity shielding them from damage liability to private individual for violation of federal law. The state sovereign immunity principle in the American constitutional are designed in two folds. First, the sovereign immunity of the Federal Government and the second is sovereign immunity of the states. Although in the development of cases and theory, state sovereign immunity principle in the U.S. is able to be waived based on some critical situations either derive from constitution or jurisprudence.

3.2.1. Doctrine Sovereign Immunity of Federal Government

The doctrine of sovereign immunity is historically adopted in the U.S. legal system, such in the case of *the United State v. Lee*, the Supreme Court remarked about this doctrine that it has been treated as established doctrine.[445] Nevertheless, in recent development of federal sovereign immunity doctrine, it can be waived by several reasons. It is because a sovereign creates the law does not mean that he should be immune to that law.

The U.S. law recognizes several legal products that are leading to abrogation of sovereign immunity doctrine, such as Law Tucker, Taking and Contracts Clause. In example the Taking Clause of the Constitution underlies in the Fifth Amendments of Bill of Rights mentions that "No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."[446] In most cases, Takings Clause violations are brought under the Tucker Act[447] or other statutory provisions explicitly granting a waiver of sovereign immunity that set forth a mechanism for

[445]*See United States v. Lee case*, 106 U.S. 196 (1882), the Court posited that "the doctrine is derived from the laws and practices of our English ancestors, and it is beyond question that from the time of Edward the First until now the King of England was not suable in the courts of that country. And while the exemption of the United States and of the several States from being subjected as defendants to ordinary actions in the courts has since that time been repeatedly asserted here. The principle never been discussed or the reasons for it given, but it has always been treated as an established doctrine."

[446] The U.S. Fifth Amendments of Bill of Rights states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[447]U.S. Tucker Act, 28 U.S.C. §1491.

monetary relief.[448]The Congress has power to waive sovereign immunity in certain Takings Clause cases and set up the compensation mechanism available to claimants, although the Fifth Amendment alone does not create a monetary compensation regime through its own language. The plain language of the Taking Clause that 'nor shall private property be taken for public use, without just compensation' is perfectly straightforward. Compensation is necessary only when property is taken or the government must compensate the property owner is when physically seized property. The text does not require compensation when regulations diminish the value of property. Indeed, the clause does not even mention regulations. Moreover, based on the Legal Tender Cases, the Supreme Court even posited that the taking clause has always been understood as referring only to a direct appropriation. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. In other words, the Fifth Amendment's Takings Clause did not prevent regulations and statutes from restricting how property could be used nor did it prevent them from diminishing the value of property. The Clause applied only to "a direct appropriation."[449]

3.2.2. Abrogation of State Sovereign Immunity Doctrine

The doctrine lays down in the Eleventh Amendment reads as follows: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."[450]It is inherently deriving from the nature of

[448]See Case of*Schillinger v. United States*, 155 U.S. 163 (1894); *Jacobs v. United States case*, 290 U.S. 13 (1933) (suit brought under Tucker Act for taking by flooding of property).

[449]See *Case Legal Tender*, 79 U.S. (12 Wall.) 457 (1871). It is the case regarding the early interpretation of the Fifth Amendments. In continuing case such *Hepburn v. Griswold*, the Supreme Court had found the legal tender laws inconsistent with the spirit of the Constitution, which prohibited the states from passing "any law that is impairing the obligations of contracts. The court held that an act compelling holders of contract to pay in gold or silver to accept legal tender was unconstitutional because deprived "such persons of property without due process of law under fifth Amendment, the congress thus constituted act unconstitutional. But in 1871 based on *Knox v. Lee* and *Parker v. Davis* case, the court reverse itself in the legal tender case by declaring that the Legal Tender Acts constitutional the Fifth Amendment does not apply to injuries which flow from the Congress lawful act, but only to direct appropriate of property. Available at:(http://supreme.justia.com/cases/federal/us/79/457/case.html) last visited 12 January 2013.

[450]The U.S. Constitution of Eleventh Amendment. The eleventh amendment is the result of political dissent against the U.S. Supreme Court ruling in *Chisholm v. Georgia* (Chisholm v. Ga., 2 U.S. 419, 1793.).

sovereignty not to be amenable to suit without consent. However it does not mean that the U.S. does not recognize state liability in the precise manner, since the principle of sovereign immunity is not applicable to political subdivisions of the state, such as cities, counties, and towns, which can be sued in a federal court.[451]

In some cases, the doctrine of sovereign state immunity can also be waived. The *College Saving Bank case*[452]is example of implying waiver doctrine when a state may impliedly abandon its sovereign immunity by engaging in conduct that comes within the ambit of an established federal regulatory program.[453]In *Parden vs. Terminal Railway case*, the Court posited that a state could make a "constructively waives" its immunity by engaging in activity that Congress regulates through its Article I of the U.S. Constitution. The waiver itself must be voluntarily and equivocally by the Congress. In the case of *Fitzpatrick v. Bitzer*, the U.S. Supreme Court discovered that Congress can abrogate state sovereign immunity doctrine by passing a statute that expressly provides for private damage suits against states.[454] The Court said that Congress's power, under Section 5 of the Fourteenth Amendment is eligible to enforce the provision of the amendment by 'appropriate' legislation, permits Congress to override the states' sovereign immunity. Another case which is approving the abrogation of state sovereign immunity is *Pennsylvania v. Union Gas Co*. when the Court held that Congress can abrogate state sovereign immunity and provide for private against states when exercising its power under the Constitution's Commerce Clause.[455] This decision appeared to promise a broad avenue of enforcement of federal law against states.

There is two ideology back ground of waiver state sovereign immunity in the U.S. The first is pre 1945 ideological background of waiver doctrine, when a state voluntarily and knowingly agrees to be sued, thus it has consented to suit, and when a state's actions otherwise eliminate its immunity; the state has waived its immunity from suit without

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Chisholm filed suit against state when it had heavy indebted in the aftermath of revolution. It was triggering constitutional reform. In *Hans v. Louisiana case* (Hans v. La., 134U.S. 1, 13 (1890)), proceedings brought by a citizen against its own state are also barred by the Eleventh Amendment.

[451]See Fons, José A. Gutierrez, (Fall 2009), 'Comparing Supremacy: Sovereign Immunity of States in the United States and Non-Contractual State Liability in the European Union', *Penn State International Law Review*, Vol. 28, No. 2, pp. 199.

[452]See Case *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expenses Bd*., 527 U.S. 666 (1999).

[453]See Case *Parden v. Terminal R. Co*., 377 U.S. 184 (1964).

[454]The Court held in Fitzpatrick that a state's employees may sue the state under Title VII of the Civil Rights Act of 1964.

[455]The U.S. Constitution, Article 8, Section 1.

consent.[456]The second is after 1945 or starting in 1945 and continuing until today. The Court is mostly reflecting a sharp hardening and ideologization of state sovereign immunity principles. State sovereign immunity was transformed from an important but rather easily be waived defense into a sacred principle that state sovereign immunity could be avoided only by the clearest and most unequivocal consent to suit.[457] In other meaning that today the waiver of state sovereign immunity needs to consider the prerogative of state to be sued in federal forum.

Sovereign immunity doctrine has been limited or abolished, either by legislation or by judicial decision, both at the federal level and in virtually all states. Governments or their officials may be liable under separate legal doctrine for any actions that are unconstitutional, whether those acts are legislative or administrative. This liability is based primarily upon a specific federal law. For example state liability principle in relation to the unlawful conduct of state official, such in case of *ex parteYoung*.[458] The requirement for this state liability or governmental liability principle is that the government conducts unconstitutional action, such as improperly taking individual property. In conclusion, although the federal government is not itself responsible for damages resulting from unconstitutional laws or administrative acts, but the federal officials who are carrying out a clearly unconstitutional law would be liable to an injured individual. The same as the official's state government who are carrying out would be liable for the damages resulting from unconstitutional law.[459] Local government such a state agencies are directly responsible for any unconstitutional laws (or other policy decision)

[456]See Case *Gunter v. Atl. Coast Line R.R. Co*., 200 U.S. 273, 284 (1906).

[457]Siegel, Jonathan R., (2003), 'Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment', *Duke Law Journal Vol. 52*, pp. 1187 – 1205.

[458]*Ex Parte Young Case, 209 U.S. 123 (1908)*, the Supreme Court case that private party allows suits in Federal Courts against officials acting on behalf of states of the Union to proceed despite the State's Sovereign Immunity, when the State acted unconstitutionally.

[459]Morrison, Fred L., (1998), 'The Liability of Governments for Legislative Acts in the United States of America, Supplement to American Law at the End of the 20th Century: U.S. National Reports to the XVth International Congress of Comparative Law, Section IV, Topic IV.D.1', *American Journal of Comparative Law* Vol. 46, pp. 351 -549. Morrison concluded that "In the case of unconstitutional actions by state governments or by the federal government, there is no assurance that the plaintiff will be able to recover, unless the plaintiff can overcome the qualified immunity of the administering officer by showing violation of a clearly established constitutional standard. In the case of a legislative act, an early challenge to the legislation by way of injunctive or declaratory relief may serve to put the enforcing officer on notice of its unconstitutionality. If the plaintiff is successful in such an action to prevent application of the legislation, a remedy would be unnecessary. In the unlikely event that the officer then ignored the injunction or declaration, a damages remedy might be available."

they conducted. It is also implied to their officials who are personally liable for any actions that violate a constitutional standard.[460]

It is almost similar to EU Institutions liability that U.S. state official is liable for breach of constitutional and federal rights which is laid down in the Civil Rights Act of 1871 and the U.S. Supreme Court case-law. Under a body of laws that differs from the ordinary rules for tort liability, governmental institutions on the U.S. may be responsible for damages or injury caused by unconstitutional legislative act. The institution is expected to know that his conduct was breach of statutory or constitutional rights, thus, the injured party or individual can bring an action for damages against them. There are two basic premises of the constitutional system of the U.S. provide a foundation for this liability. The first premise was the unconstitutional act and second is compensation. In the earliest decision of the U.S. Supreme Court that is no legislative body has the competence to enact an unconstitutional law. If any legislative body, whether the U.S. Congress, or a state legislature, or a city council, attempts to enact a law that violates the constitutional rights of the citizen, thus, individuals hold constitutional rights such as fundamental human rights or an economic right, may sue against legislative body to seek compensation on their damages.[461]

Significantly, both EU and the U.S. practice to imply state liability principle is coherence with the violation of rights, whether it is fundamental rights derive from superior of law, or rights that is protected by the constitution. The EU supranational system of law recognizes state liability and EU liability for breach of superior rule of conferring to protect individual's right. This condition is deemed to be the prominent requirement in order for individual to obtain compensation. Meanwhile, the U.S sovereign immunity doctrine can be abrogated if the act of government's official constitutes unconstitutional act which is violating constitutional rights of individual. According to Meltzer, "there are commonalities between EU and the U.S. that both systems have cushioned the impact of damages liability for governmental action, whether imposed directly on governments themselves (as in the EU), or on government officials (as in the U.S.). such a constitutional remedies can be seen as serving two basic goals that first is providing compensation to those whose rights have been infringed, and second is creating a system of sanction designed to ensure an adequate level of adherence

[460]Case *Owen v. City of Independence*,445 U.S. 622 (1980)

[461]Meltzer, Daniel J., (2006), 'Member State Liability in Europe and the United States', *International Journal of Constitutional Law*, Vol. 4, Issue 3,pp. 39-83.

to constitutional right both the EU and the U.S."[462] In conclusion, the perception of state liability principle is that government is obliged to protect constitutional right (such an economic right) by providing a system to compensate or to rectify the right that has been infringed.

4. The Effect of WTO Law in the EU and the U.S.

In order to analyse the possibility of private economic actors to obtain compensation due to damage caused by the disobedience of their governments to WTO Law, it is necessary to discuss the effect of WTO Law in the EU and the U.S. legal system.

4.1. The Effect of WTO Law in the EU Legal System

The EU is supra national union established by EU Treaty which should accommodate interest of 28 countries members. The EU Commission submitted the proposal for the conclusion of the results of the Uruguay Round in the familiar format of a decision of *sui generis* that the Council was asked to approve the WTO Agreements, its annexes, the ministerial decisions and declarations and the Understanding on Commitments in Financial Services (Final Act of the Uruguay Round), Plurilateral Trade Agreements (Annex 4), and a minor side agreement on bovine meat concluded with the Uruguay Round. The Council would have to give its approval on the basis of Article 207 TFEU (ex. Article 133 of the TEC or ex Article 113 EEC).[463]The Commission also explicitly made all matters within the ambit of the WTO would be under EU discipline. It was asserted by the Member States to become Members of the WTO, and they should participate in the WTO and its organs, that is to say that the Member States would sit on the organs of the WTO grouped together as individually identifiable members of EU delegation.[464]

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[462]*Ibid*.

[463]The Court of Justice has been given the interpretation of Article 133 of the TEC ex 113 EEC (Article 207 TFEU) that the Council has exclusive power in the field of commercial policy in the EU, see *Opinion 1/75, (1975), ECR 1355.*

[464]See Kuijper, Pieter J., (1995), 'the Conclusion and the Implementation of the Uruguay Results by the European Community', *European Journal of International Law* Vol. 6, pp. 225. This proposal concluded the long debate regarding the Commission view that logically would lead to the EU alone becoming a Member of the WTO. Almost all of the Member States and the Council did not agree and believed that the WTO covered important subject which had remained within the Member States' power, and this should be concluded as a mixed agreement.

With regard to the effect of WTO law in EU law[465], the history began when the Commission submitted remarkable proposal that it should not be possible to apply direct effect, since the U.S. and many other WTO members would explicitly exclude such direct effect as well. Accordingly, the Commission explained if direct effect were not explicitly excludes in the EU, it would raise an important imbalance of trade relation under WTO Agreements between the EU and its partner's countries, in addition, in the absence of reciprocity principle would place EU trader in the disadvantage position compared with their foreign competitors. [466] It is furtherance stated clearly in the Preamble to the Council Decision of 22 December 1994 on the conclusion of the WTO Agreement, that " by its nature, the Agreement Establishing the World Trade Organization, including annexes thereto, is not susceptible to being directly invoked in Community (EU) or Member State courts."[467]

The absence of reciprocity principle is then lengthening to the case of non-conformity EU Measure with WTO Agreements. *The Portuguese v. Council case* showed the reflection of non-direct effect by the Court, based on the principle of the absence of reciprocity. In this case, Portugal challenged the decision of the Council to conclude Memoranda of Understanding with India and Pakistan on market access for textile products.[468] According to Portugal, the memoranda are being inconsistent with the GATT 1994, the Agreement on Textiles and Clothing, and the Agreement on Import Licensing Procedures. The ECJ held that Portugal could not rely on the provision of the WTO Agreement, because they were among the rules that could be used to challenge the legality of EU measures. The Agreement therefore was held not to have direct effect within the EU legal order and the WTO

[465]In terms of effect of international law in general on the EU legal system, Article 216 (2) TFEU declares that international agreements concluded by the EU is binding not only on the EU Member States but also on the EU Institutions. International agreements form as an integral part of the EU legal system as soon as they enter into force. For example see Case 181/73 *Haegeman v. Belgian State* (1974) ECR 449, para 4ff. Thies, *Supra Note 444* location 2238

[466]Kuijper , Pieter J., *Supra Note 464*. Although Switzerland took initiative to try to ensure that either domestic law or EU law should assure direct effect or self-executing of WTO law, the major of the members and the Commission could not accept it, since the major fear is, for instance, subsidiaries the US Companies would be able to enforce their rights directly through EU courts, including Members states Courts, striking down of laws of regulatory contrary to the WTO Law, while subsidiaries EU Company would have to go through the Commission, a member state, and subsequently await the result of dispute settlement procedures.

[467] Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the EC (EU), as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations, *OJ 1994, L446,* pp. 1.

[468]Council Decision of 26 February 1996 concerning the conclusion of Memoranda of Understanding between the EC (EU) and the Islamic Republic of Pakistan and between the European Community (EU)and the Republic of India on arrangements in the area of market access for textile products, O*.J. L 153, 27/6/1996, pp. 47.* Notably, Portugal had voted against the conclusion of the Memoranda in the Council.

Agreement cannot be used to challenge the legality of EU Measures.[469] To that extent, the Court relied on three examinations on this case. First, the ECJ remarked that the WTO system is based on the negotiation between the parties, thus if it is to be considered as non-compliance of WTO rules, the parties to dispute are able to negotiate with a view of DSU.[470] The second issue is absence of reciprocity principle; in this regard, the ECJ essentially held that since the major trading partners of the EU do not grant direct effect of WTO law, in the interest of the principle of reciprocity, the ECJ was precluded from doing so. The Court affirmed that this principle constitutes as valid justification for the denial direct effect in relations between equals and balance to invoke international agreement such as WTO Agreements.[471]The third issue is the freedom of political institutions. The grant of direct effect would compromise the freedom of the EU political institutions within the WTO system. The Court relied on two aspects of it, first is the external aspect, where the grant of direct effect is destined to weaken the negotiating strength of the institutions within the WTO in relation to the most important trading partners. Second is the internal aspect where the grant of direct effect would have the consequence that any EU legislative measures could be challenged before the ECJ when the product of legislation is incompatible with the WTO Agreements.[472]

The effect of WTO on the EU also concern to the effect of WTO adjudication decision on the EU measures. The enforcement of WTO decisions in the EU legal system against EU measure may arise at different stages: absent, pending, or after WTO dispute settlement proceeding on such an EU measure. In the absence of dispute settlement proceeding, the EU could maintain on the non-enforceability of WTO rules. In this stage EU has a number of open possibilities, such as; it can seek a negotiation solution with the opponent member

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[469]Case C-149/96 *Portugal v. Council* [1999] ECR I-8395, in this case, the Court held that: "having regard to their nature and structure, the WTO agreements are nit un principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community (EU) institutions."

[470]*Ibid*, decision of the Court. This examination held by the ECJ as contentious opinion with AG Saggio opinion who posited that the obligation to apply WTO law does not extend to the violation of primary EU law. If WTO law is found to be in conflict with primary EU legislation, the latter should be upheld despite the risk of the EU suffering international responsibility. See AG Saggio Opinion in Case *C-149/96 Portugal v. Council* [1999] ECR I-8395 at para. 22.

[471] Antoniadis, Antonis, (2007), 'the European Union and WTO law: a nexus of reactive, coactive, and proactive approaches*'*, *World Trade Review*Vol. 6:1, pp. 50.

[472]*Ibid*, see also Rudolf, Beate , (2000), 'European Community – WTO Agreements – Effect of International Agreements in European Community law – Ability of Individuals and Member States of European Community to rely on WTO Agreements*'*, *The American Journal of International Law*, Vol. 94, No. 4 (Oct., 2000), pp. 740-745.

(disputant party), -if the dispute under the GATT- it can request a waiver, it can unbind the duties and others political measures instead of judicial manner.[473]In the pending stage, J.H. Bourgeois commented when a dispute settlement proceeding is initiated, as the respondent party; the EU still has many possibilities to avert the subsequent adoption by the DSB. In this term, EU still can take account to stay the proceedings pending the outcome of the WTO dispute. Once a Panel or Appellate Body report finding that an EU measure breach of WTO rule and it is adopted by DSB, there are still two options whether EU by the declaration of ECJ that an EU measure, constitutes breach WTO rules, is operated as a rule *ex tunc*, or whether EU brings the measure into conformity to WTO rules.[474]Eeckhout also posited that a connection the judicial operators between WTO adjudication bodies and EU has several distinction: first, after the Panel and Appellate Body reports adopted by DSB in general, and the report regarding the breach of WTO rules by the EU. Second, when there is pending on WTO dispute settlement proceedings on alleged breaches by the EU of WTO rules, and subsequent, when EU adopts Panel and appellate Body reports.[475]

In the relation with the infringement of WTO Law by the EU, there are three phases that individual can challenge the EU act.[476] First, individual can file suit against EU in EU Courts when a breach of primary WTO law before the dispute is brought before the DSB.[477] Second, a breach of WTO law that has already been identified by the DSB, but the period granted for compliance has not yet expired[478], and, third, a breach of WTO law is upheld despite the

[473] H.J. Bourgeois, Jacques, 'The European Court of Justice and the WTO: Problem and Challenges', (2000), in *The EU, the WTO, and the NAFTA: Towards a Common Law of International Trade?,*ed. Weiler, J.H.H., Oxford University Press – Oxford/UK, pp. 120. Bourgeois concluded in this stage, a good argument could be made that it would be premature for the ECJ to recognize enforceability of the WTO rule in the EU legal system with the normal consequence that it would declare the EU measure unlawful.

[474]*Ibid*, Bourgeois mentioned that even assuming that the 'pay' option is not a measure of last resort, once a breach of WTO rule is established by the DSB that option can no longer justify denying enforceability of the WTO rule in the EU legal system. If that were the case, hardly any international agreements would be enforceable in the EU legal system, in could probably do so by ruling pursuant to Article 174 (1) (new Art. 231).

[475]Eeckhout, Pieter, (1997), 'The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems', *Common Market Law Review* No. 34, pp. 48.

[476]Thies, *Supra Note 444* , (kindle) Location 3192

[477]See Case T-30/99, *Bocchi Food Trade International GmbH v. Commission of the European Communities* (2001) ECR 947. Joined Cases C-364/95 and C-365/95, *T.Port v. Hauptzollamt Hamburg – Jonas*, (1998) ECR I – 01023.

[478] See case T-69/00, *FabbricaItalianaAccumulatoriMotocarriMontecchio Spa (FIAMM) vs. Council of the European Union* (2005) E.C.R. II-5393, (hereinafter FIAMM Case)

determination of the DSB and the expiry of the period of time to comply is granted by the DSB.[479] When the EU decides not to bring the measure into conformity to WTO rules, some implications would rise, whether the implication is the trade damage due to the infringement WTO Law by the EU[480], or the implication due to the disobedience of EU to the DSB Decision, such as imposition of suspension concession or retaliation from other WTO Member.[481] This research merely concern on the implication of retaliation from other WTO member. It will be discussed in the following chapter.

4.2. The Effect of WTO Law in the United States of Legal System

There are three different perspectives when the U.S. government adopted the WTO Agreements into domestic law, first is an isolationist perspective which is arguing that the U.S. Law precludes considering whether or not domestic statute or its interpretation is consistent with WTO norms. Second is an internationalist perspective and argues that the U.S Law requires U.S statutes to be interpreted and to be consistent with WTO Laws unless Congress clearly intends otherwise. Third is an intermediate position is that agreements and decisions may be considered, but their significance is limited and WTO decisions by themselves are not sufficient to warrant overturning and agency's statutory interpretation.[482]

Traced back to the background on the relationship of the WTO Agreements to the U.S. Law, when Congress approved and implemented the WTO Agreements and the other agreements negotiated in the Uruguay Round Agreement Act(hereinafter URAA)[483] as non-self-executing measures. Non-self-executing means the legal effect of WTO Law in the U.S. is based on their implementation to U.S. legislation. Thus, the legislation regarding the implementation of WTO Law is given effect as law in the United States rather than the agreements themselves. So it clearly states there is no provision of the WTO Agreements that

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[479] See Case C-93/02 P, *Biret International SA v Council of the European Union* (2003), ECR I-10535 (hereinafter Biret Case)

[480] *Ibid*, see also Case C-377/02, *Léon Van Parys NVv. BelgischInterventie- en Restitutiebureau (BIRB)*, (2005) ECR I-01465

[481] Case T-383/00 *Beamglow Ltd v European Parliament and Others (Spain, intervening)* (2005) ECR II-05459

[482] Reed, Patrick C., (2006), 'Relationship of WTO Obligations to U.S. International Trade Law: Internationalist Vision Meets Domestic Reality', *Georgetown Journal of International Law*, Vol. 38, Issue 1, pp. 209-211. See also Williams, Michael F., (2001), 'Charming Betsy, Chevron, and the World Trade Organization: Thoughts on the Interpretive Effect of International Trade Law', *Law and Policy International Business Journal*, Vol. 32, Issue 4, pp.677, 693-97.

[483] Uruguay Round Agreements Act § 102(a), 19 U.S.C. § 3512(a).

is inconsistent with the U.S. law is given effect. Section 102 (a)(1) of the URAA states that "*no provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.*"[484]This part of URAA based on the term of constitutional restrain on self-executing character of international law. An international agreement cannot take effect as domestic law without implementation by Congress if the agreement would achieve underlie within the exclusive law-making power of Congress under the Constitution.[485]The URAA further provides that nothing in the statute "shall be construed to amend or modify any law of the United States or to limit any authority conferred under any law of the United States unless specifically provide for in this act."[486]

The WTO leaves the members to adopt those agreements according to their legal systems. As the U.S. system did not apply self-executing to WTO Agreement, somehow the position of the direct effect of WTO Agreements in the United States is clear that both direct applicability and direct invocation is denied by the URAA. The U.S. Government has profound reason regarding the WTO implementation into their legal system. There were sovereignty objections when the U.S. ratified WTO Agreements. The objections became debate toward the institution of WTO. Some opponents to the WTO argued that the WTO posed risks to U.S. sovereignty because decisions could be made in the WTO that would override U.S. law. This objection engages a number of particular clauses of the WTO, as well as the legal effect of potential WTO decisions in the U.S. domestic law. Hence, this is leading to conclusion that WTO decisions did not have self-executing or direct legal effect in the U.S. law, since it will erode U.S. sovereignty.[487]

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[484]*Ibid*, Section 102 (a)(1).

[485]*Restatement of the Law — Foreign Relations Law of the United States, Restatement (Third) of Foreign Relations Law of the United States*, 1987-2011, the American Law Institute. Other reason of non-self-executing agreement if An international agreement therefore providing for the payment of money by the United States requires an appropriation of funds by Congress in order to effect payment required by the agreement

[486] URAA at § 102(a)(2), 19.U.S.C. § 3512(a)(2)

[487]Jackson, John H., (1997), 'the Great 1994 Sovereignty Debate: United Stated Acceptance and Implementation of the Uruguay Round Results, Chapter 2: Constitutional Question', *Columbia Journal of Transnational Law*, Vol. 36, No. 7, pp.157-173. See also Sprance, Willliam R., (1998), 'The World Trade Organization and United States Sovereignty: The Political and Procedural Realities of the System', *American University International Law Review*, Vol.13, No. 5, pp.1225-1265. Sprance concluded that "the U.S. has not surrendered its sovereignty by joining the WTO. In fact, American sovereignty is protected in several ways. First, Congress passed implementing legislation that ensures U.S law takes precedence in the event of a conflict with one of the WTO Agreement. The implementing bill also provides that WTO decisions do not have the power to change U.S. law. Second, the institutional structure of the WTO protects its member's sovereignty."

The URAA limits the status and effect of the WTO Agreements in the U.S. Law, by promulgating section 102. This section also refer to the non-effect on DSB decision, includes the prohibition of private right of action based on the WTO Agreements. Nevertheless, URAA is the U.S legislative product which is regulating the intention"[to] bring the U.S. Law fully into compliance with the U.S. obligations under the WTO Agreements. It is accomplished objective with respect to federal legislation by amending existing federal statutes that would do otherwise be inconsistent with the agreements and, in certain instances, by creating entirely new provisions of law". To fulfill this commitment, the U.S Government furtherance to amend all existing Federal statutes or provision of new authorities as known to be necessary or appropriate to enable full implementation of, and compliance with the U.S obligations under the WTO Agreements.[488] To this end, the Congress approved Uruguay Round Agreements Act Statement of Administrative Action (hereinafter SAA) to be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreement and to this Act in any judicial proceeding in which a question arises concerning such interpretation or application.[489]

URAA sections 123 and 129 govern the effect of decisions under the DSU that the result of any WTO dispute settlement proceedings will not be incorporated into United States law without following a specific domestic implementation process. Coherence with the non-direct effect of the WTO Agreements into the U.S. domestic law, that the WTO dispute settlement decision would not apply directly in the U.S. domestic law, except by legislation approved by the Congress.[490] The DSB decision also does not have any effect into private remedy, since URAA prohibits private remedy due to inconsistent of the U.S. law with the WTO Agreements. It states in Article 102 (c) (1) that "*No person other than the United States shall have a cause of action or defense under any of the Uruguay Round Agreements or by virtue of congressional approval of such an agreement, or may challenge, in any action*

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[488]H.R. REP. NO.103-826, pt.1, at 25 (1994), as reprinted in 1994 U.S.C.C.A.N. 3773. SAA gives interpretation of section 102 (a) states " if there is a conflict between U.S. law and any of the Uruguay Round agreements, the implementing bill makes clear that U.S. law will take precedence."

[489]Ibid, 103(d), 19 U.S.C. § 3512(d).

[490]*Ibid*, see Leebron, David W., (1997), 'Implementation of the Uruguay Round Results in the United States', *inImplementing the Uruguay Round*, eds. Jackson, John H.& Sykes Jr., Alan O., Clarendon Press – London/UK, pp. 212. See also Smith, Aubry D., (1996), 'Executive – Branch Rulemaking and Dispute Settlement in the World Trade Organization: A Proposal to Increase Public Participation', *Michigan Law Review*, Vol. 94, No. 6, March – 1996, pp.1276. Smith analyzed that in the statute implementing the WTO, the URAA, and Congress established a scheme designed to assert political control over the United States' interaction with the WTO.

brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a state on the ground that such action or inaction inconsistent with such agreement."[491] The interpretation of Article 102 (1) (c) profoundly remarks that private party cannot bring an action to require, preclude or modify government exercise of discretionary or general public interest authorities under the other provisions of law. Contextual interpretation is that the URAA precludes any action by private party against a state "under or in connection" with any Uruguay Round Agreements. According to House Ways and Means Committee report, the prohibitions on private rights of action "are based on the premise that it is the responsibility of the Federal Government, and not private citizens, to ensure that Federal or State laws are consistent with U.S. obligations under international agreements such as the Uruguay Round."[492] From this interpretation, it could be underlined two different points of views in regard with non-direct effect of WTO Decision into U.S Law. First, private party cannot challenge the U.S. Government regarding non implementation of the WTO Agreements, non-conformity of WTO Agreements and/or any actions or inactions that conducted by any departments, agency, or other instrumentality of the United States, any state, or any political subdivision of a state.[493] Second, the premise that Federal Government responsible to ensure that Federal or State laws are consistent with U.S. obligation under WTO Agreements, to the extent of Federal Government responsibility, most courts recognize that, at least under certain conditions, a WTO dispute settlement decision may be taken into account by a court in ruling on the correctness of a federal agency's determination, such in the case of*SNRRoulements v. U.S.*, the Court stated that WTO decisions may shed light on whether an agency's practices and policies are in accordance with the international obligations of the U.S.[494]

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[491] URAA Section 102 (c) (1)

[492]Uruguay Round Agreements Act Statement of Administrative Action (H.R. REP. NO. 103-826, pt.1, at 25 (1994), as reprinted in 1994 U.S.C.C.A.N. 3773).

[493] See the interpretation of section 102 (c) of the SAA In*H.R. DOC. NO.103-316, at 676* (1994).

[494] See *SNR Roulements v. U.S.*, 118 F.Supp.2d 1333 (2000),The Court in SNR Roulements v. U.S. posited that the relevance of a WTO dispute settlement decision in this context lies solely in its persuasive force as a means of properly interpreting a controlling statute. It is emphatically the province and duty of the judicial department to say what the law is. This persuasive force, however, must be carefully balanced with the reasoned rulemaking process underlying Chevron step-two deference. The Court is wary of overstepping the bounds of its judicial authority under the guise of the Charming Betsy doctrine stating that unless the conflict between an international obligation and Commerce's interpretation of a statute is abundantly clear, a court should take special care before it upsets Commerce's regulatory authority under the Charming Betsy Doctrine. The Court also is mindful of the prerogative of the Executive Branch, most importantly, the office of the U.S. Trade Representative in dealing with the WTO in its diplomatic and policymaking roles. See also *Murray v. Charming Betsy, The, 6 U.S. 64, 2 L. Ed. 208, 1804 WL 1103 (1804)*,

Nevertheless, the WTO adjudications decisions may not be binding on the United States in requiring that the U.S. regulatory need to conform its law to adverse WTO decisions, the legal consequences will flow as a result of those decisions, such as adverse decisions require offending states to conform or compensate.[495]At any situation where State law is at issue in a WTO dispute, the URAA provides for federal-state cooperation in the proceeding and limits any domestic legal challenges to such law to the United States. Such in the case *of United States – Equalizing Excise Tax Imposed by Florida on Processed Orange and Grapefruit Product,*[496] when Brazil submitted a dispute regarding the impact of the Florida equalizing excise tax that had been to provide protection and support to domestic processed citrus products and to restrain the importation of processed citrus product into Florida. This case was resolved in 2004 without panelist having been appointed after Florida amended its statutes, and both parties submitted Notification of Mutually Agreed Solution.[497]

In light of the WTO obligations, URAA vehement the U.S. either federal and state law to conform its regulatory law with the WTO Agreements, although the URAA itself regulate that due to the supremacy of federal law, state law may not interfere with the U.S. obligations derives from the WTO agreements as international agreement. The URAA also deals with the issue that federal government has complete monopoly to bring an action against or to raise any defense against the applicability of any state law claimed to be inconsistent with a WTO provision by any person. Although the WTO Agreements would prevail over inconsistent of State law, this outcome can only be established if the federal government itself chooses to seek a judicial order to that effect. A political decision must be taken at the federal level before a State law inconsistent with any of the WTO agreements.[498] It could be a strong behest within the U.S. legal system that private parties are completely barred from seeking to give direct effect to WTO provision in court proceedings, whether the challenge is to federal

[495]Case*Canadian Lumber Trade Alliance v. U.S*., 425 F. Supp. 2d 1321, 28 International Trade Representative 2006.

[496]*United States — Equalizing Excise Tax Imposed by Florida on Processed Orange andGrapefruit Products*, WT/DS250/3 (June 2, 2004).

[497]*Ibid.*

[498]Barcelo III, John J., (2006), 'The Status of WTO Law in U.S. Law', *Cornell Law Faculty Publications*,No. 36, pp.1-34

or state law. The UURA even nullifies the few cases in the pre-WTO era that had allowed private enforcement of GATT law against the States.[499]

Furtherance, in terms of the effect of WTO decision in U.S. law, URAA Section 123 (g)(1) provides "in any case which a dispute settlement panel or the Appellate Body finds is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modifies in the implementation of such report unless and until ..(there follows a list of requirements including, among others, consultation with Congressional committees, non-federal government officials and private sector representatives respecting whether and, if so, in what manner to implement decision)." This Article is clearly stating that URAA rejecting any adjudicatory force within the U.S. legal system for WTO Panel and Appellate Body rulings. John J. Barcello III explained that the political process plays a significant role in a way to implement of the DSB Decision based on consultations with relevant Congressional committees and private sector interest groups. Since the implementation in any particular case is requiring new legislation or simply a change in agency interpretation of existing law, any change in agency interpretation would have to be prospective, unless the President specifically determines that an earlier implementation date is in the national interest.[500]

Based on brief explanation regarding the effect of WTO Agreements and DSB decisions in U.S. law above, it comes to the conclusion that the U.S. legal system adhere to the principle of sovereignty, which John H. Jackson argued that a large and powerful state would more likely be hesitant to accept obligations to an international decision-making procedure that would most probably result in decisions contrary to the national goals of such a powerful state.[501]Due to this concept it can be seen that the intermediate position is significantly used in terms of elaborating the relationship of WTO in the U.S. Law, when the WTO Agreements and DSB decisions may be implemented through executive agreements subject to the explicit approval from houses of Congress under the so-called "fast-track" procedures.[502] In term of implementation of WTO Law, the procedure requires legislative approval and Congress action to adjust domestic law to conform with WTO Law, in the same

[499]*Ibid*, see also Brand, Ronald A., (1997), 'Direct Effect of International Economic Law in the UnitedStates and the European Union', *Northwestern Journal International Law & Business*, Vol. 17, Issue 1, pp. 562, 569, 608.

[500]19 USC § 3533(g)(2) (2000), see Barcelo III, *Supra Note* 498 , pp.4.

[501]Jackson, *Supra Note*487, pp. 157-188.

[502] See Reed, *Supra Note*482 .

way of the authority of executive branch when it represent the United States in dispute settlement of the WTO. The URAA establishes information and consultation requirements designed to keep Congress, various quasi representative bodies, and the public informed about the Executive Branch's participation in the WTO activities.[503]

The most significant clause in the URAA is that private parties do not have rights to challenge the U.S. Government "under or in any connection" with WTO Law, since the U.S. Federal Government has prominent responsibility to ensure that the U.S. Laws are consistent with U.S. obligations under WTO Agreements. The interpretation of the URAA section 102 therefore is lengthen to the "impossibility" of private parties to seek compensation caused by the WTO retaliation, since The URAA section 102 is affirmative clause not to include private party. SAA hereby interpret the Section 102 (C) as "Section 102(c) of the implementing bill precludes any private right of action or remedy against a federal, state or local agency. A private party thus could not sue (or defend suit against) the United States, a state or a private party on grounds of consistency with those agreements."[504]However, having in mind that the implementation of the WTO in the U.S. Law is merely 'highly political process' when the WTO rules function as rules within the U.S. legal system only to the extent Congress faithfully captures them in implementing legislation or executive agencies conform their interpretation of ambiguous statutes to comply with WTO requirements. Congress has blocked all direct effect for WTO law and arguably even all indirect effect at least in judicial proceedings.[505]

5. Conclusion

Both EU and the U.S. is member of the WTO, and they are bound by WTO Law as international law pursuant to principle of *factasuntservanda*. They are obliged to perform obligation derives from WTO Agreements in good faith.[506] If they violate WTO Laws, or they

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[503] See Smith,*Supra Note*490. The URAA established set of provisions to give the general public access to information about adjudication proceedings by requiring that they be as transparent as possible within the constraints of WTO rules. Another set of URAA provisions established procedures designed to subject the Executive Branch's interaction with the WTO during adjudication to oversight by congressional committees and quasi-representative bodies. A third set of provisions applies similar oversight provisions to the regulatory implementation of WTO rulings.

[504]See Section 102(c) of the URAA, as interpreted in the Statement of Administrative Action, letter f, in *H.R. DOC. NO. 103-316*, (1994), p. 676,

[505] See Leebron, *Supra Note*490, pp. 181.

[506] See Article II (Scope of WTO) Agreement of Establishing of the World Trade Organization, available at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf. This article base on Article 26 Vienna Convention

nullify and impair other WTO Member trade benefits, they can be held responsible by other WTO Member.[507] However, nothing in the WTO Law mention about responsibility to other citizen of other WTO Member, nor to their own citizen due to the violation of WTO Law. Thus, when the violation of WTO law is causing trade damage to individual within their jurisdiction, it will depend on their legal system to apply state liability principle in order to give compensation for damage caused to individual.

From the explanation above, the major obstacle to imply state liability principle is that both countries theoretically do not recognize concept of direct-effect of WTO Law to their legal systems, where direct effect means that the individual can rely on the WTO Law in order to file suit against their government for the violation of WTO Law. But, if the notion of state liability principle is protecting individual rights from infringement conducted by government, the compensation will be given base on infringement of individual rights. However, it needs to find more detail argument to support this hypothesis, to this end the research continue to discuss the implication of WTO retaliation to private economic actors by discussing the cases in order to answer the question 'to what extent is state liability accomplished'.

on Treaties states that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". Available at http://www.worldtradelaw.net/misc/viennaconvention.pdf, last visited 11 January 2013.

[507] See Article 3 (8) of the DSU.

CHAPTER IV

THE IMPLICATION OF WTO RETALIATION TO PRIVATE ECONOMIC ACTORS: TO WHAT EXTENT STATE LIABILITY IS ACCOMPLISHED?

CASE STUDY

1. Background

Chapter II discussed about the role and the right (substantive and procedural) of private economic actors in the WTO trading system. All WTO Members are obliged to imply these rights in term of implementation of WTO Agreement in the context of international trade among them. However, even if private economic actors are accorded rights derive from the implementation of WTO Agreements; they do not have procedural right to stand before WTO adjudication body. The absence of procedural access to the dispute settlement system for individual because of the characteristic of the WTO is intergovernmental organization where the Member State is the only eligible party to stand before the WTO adjudication bodies.[508]

Nevertheless, the prominent problem is when state reluctant to induce private economic actors to rely on the WTO law and to obtain judicial protection of their rights if their governments are violating WTO law that have affected their business. For example in Banana case, EU private economic actors have suffered heavy losses in facing retaliatory measures resorted by the United States under the authorization of the WTO Dispute Settlement Body. The retaliation created some implications to EU private economic actors. These implications thus are the main subject of this chapter, in a way to reveal to what extent state liability principle is applied by EU. Besides Banana case, this chapter also discuss another case, such a Foreign Sales Corporation/Extra Territorial Income case (FSC/ETI), in order to obtain comprehensive analysis to what extent the U.S. government is accountable for damage that might have affected their private economic actors caused by retaliatory measures resorted by the EU. The U.S. is more using political approach in dealing with the economic impact of WTO retaliation, because the U.S. law does not recognize direct effect of WTO

[508]Laihhold, *Supra Note* 276, pp.449.

decision. The choice of word implications aimed to envision that the retaliation has both legal and economic impact to the private economic actors. This chapter is thus describing, firstly, the economic and legal implications of retaliation measure to some private economic actors, and secondly is analyzing to what extent state liability principle could be implied by these governments in a way to compensate trade damage suffered by private economic actors.

2. From Banana Case (the U.S. v. the EU) to FIAMM Case

This sub section discusses the factual background on the implication of the WTO retaliation for private economic actors. It begins with the controversy of banana case between the U.S. and the EU. Banana case furtherance is triggering several questions regarding non contractual liability in the EU, since some private economic actors in the EU become 'collateral victims' of the banana wars between the U.S. and the EU.[509]

2.1. The General Overview of Banana Dispute

Banana dispute began in 1993, when Costa Rica, Colombia, Nicaragua, Guatemala, and Venezuela invoked GATT dispute settlement procedures to allege that European banana import and licensing schemes violated GATT rules. In 1994, The GATT Council finding that the European quota regimes for banana export violated Article I and XI.1 of GATT. According to Panel, the EU's preferential trading arrangement for bananas violated the Most Favored Nation (MFN) clause of GATT, because it treated bananas from Africa, Caribbean and Pacific (ACP) countries[510], particularly from twelve traditional ACP supplying countries, more favorably than bananas from other countries of origin.[511]Furtherance, The EU therefore adopted a new regulation. However, the new regulation – regulation 404/93- still maintained the distinctions between ACP and non ACP exporters in a way that favored the ACP

[509]Opinion of Advocate GeneralPoiaresMaduro (hereinafter A.G. Maduro) in Joined Cases C--120/06 P and 121/06 P, *FabbricaItalianaAccumulatoriMotocarriMontecchioSpA (FIAMM) and Others v. Council* and *Commission and Giorgio Fedon&FigliSpA and Others v. Council and Commission* [2008] ECR I--6513 (hereafter Opinion AG Maduro), delivered on 20 February 2008.

[510]The origins of banana dispute can be traced to the late 1950s when the EC (EU) first established preferential trading arrangements with former European colonies in Africa and the Caribbean and Pacific regions (ACPs). The common market organization replaced the EC's consolidated tariff of 20 percent ad valorem on banana imports, which had been in effect since 1963. See Tangermann, Stefan, (2003), 'European Interest in The Banana Market', in *Banana Wars: The Anatomy of a Trade Dispute*, eds. Josling, E.T., and Taylor, T.G., CABI Publishing – Oxon/UK, pp.22.

[511]Report of the Panel, *EEC-Members States' Import Regimes for Bananas (DS32/R)*, 3 June 1993.

exporters.[512] According to complain from Latin America countries, regulation 404/93 was found to violate GATT Article I, which embodies the MFN, Article II concerning tariff bindings, and Article III concerning national treatment obligation. The EUtherefore requested a waiver from obligation based on Article I (1) and it was granted on December 1994 by a decision of the GATT Contracting Parties. It allowed the EU to deviate from MFN clause due to the necessary of extent to provide preferential treatment for products originating in ACP states as required by the Fourth Lomé Convention, without being required to extend the same preferential treatment to like products of any other contracting party.[513]

In 1994, Colombia, Costa Rica, Venezuela and Nicaragua accepted the so-called Framework Agreement on Bananas (hereinafter BFA)[514], which still consists the EU to increase the tariff quota for non-ACP bananas on a country-by-country basis, and to revise the management of export licenses.[515] However, this framework was not accepted by all parties. In example, Guatemala refused it, Latin America countries still wanted to arrange this framework based on GATT, Ecuador and Panama could not be subject to this framework because they were not member of GATT at that time, Germany and the U.S. protested this

[512] The allocation of the tariff quotas, as well as a system of import licenses foreseen in Regulation 404/93 benefited ACP countries, to the detriment of non-ACP exporters, imposing new restrictions on the import of bananas into EU Members States, including Germany. See GATT Panel Report, *EEC-Import Regime for Bananas, DS38/R* (Feb. 11, 1994).

[513]The Fourth Lomé Convention was signed on 15 December 1989 by the EC (EU) and the ACP countries, many of which are now WTO members. See African, Caribbean and Pacific States-European Economic Community: Final Act, Minutes and Fourth ACP-EEC Convention of Lome, 15 Dec. 1989, 29 I.L.M. 783 (1990). The EC(EU) and ACP countries were granted 'Lomé Waiver', a waiver of their GATT obligations pursuant to GATT Article XXV: 5 and WTO Article IX:3. Under those provisions, the GATT General Council and the WTO Ministerial Conference may waive GATT member's obligations under the GATT and related multilateral trade agreements in exceptional circumstances. See Marinberg, Daniel, (2001), 'GATT/WTO Waivers: "Exceptional Circumstances" as Applied to the Lomé Waiver*'*, *Boston University International Journal*, No. 19, pp.153.

[514]The BFA took effect on January 1995, and it is set to expire on 31 December 2002.See*EU: Regulation (EU) No 3224/94*, European Union Legislation: Commission Regulation (EU) No. 3224/94 of December 1994 laying down transitional measures for the implementation of the Framework Agreement on Bananas concluded as part of the Uruguay Round of multilateral trade negotiations, official Journal L 337, 24/12/1994, p.72.

[515]*Ibid,* Under the BFA, the EU allocated it its GATT Article II Schedule to each of the four exporting countries specific shares of the bound basic tariff quota. This privilege gave guarantee a slice of the tariff-rate quota for dollar bananas. Costa Rica, for instance, received a 23.4 percent share, Colombia a 21 percent share, Nicaragua a 3 percent share, and Venezuela a 2 percent share. To be sure, according to BFA, these countries did not get better than average treatment for free, although they agreed not to sue the EC in the WTO before 2002.

framework.[516] In result, Latin America countries filed suit against the EU again, in this time, the U.S. took part as complainant against the EU to the WTO adjudication bodies.[517]

The main reason for the U.S. took part as main complainant in the banana dispute III, because Chiquita Brand International, Inc. and the Hawaii Banana Industry Association filed petition according to Section 301 to the USTR.[518]Certainty the U.S. involved in the Banana dispute raised the most significant question from the EU as to why the U.S. had any 'interest' in the banana import regime, since the U.S. is considered as producing few bananas and exporting none to EU. This became a non-legal question that submitted by EU. Josling argued that the trading interest of U.S.-based on multinationals company request did not constitute an excuse for the U.S. Government to get involved in banana dispute. The GATT and WTO dealt only with goods, therefore the intention of the DSU was not to examine 'abstract legal questions', but to deal with actual trade impediments. The U.S. claimed if Chiquita and Dole suffered in the EU market, the U.S interests were involved. Moreover, those companies are producers in Hawaii and Puerto Rico (within the customs area of the U.S.) that impacted indirectly by the effect on world banana markets.[519] The USTR basically investigated the EU banana import regime on October 1994, because the Framework Agreement seem had not yet been implemented by the involved "dollar zone"

[516] See Bhala, Raj, (2000), 'The Banana War', *Mc George Law Review*, No. 31, Summer 2000, pp. 844.

[517]*EC – Bananas III, WT/DS/27*, 25 September 1997.

[518] Section 301 of the U.S. Trade Act of 1974 authorizes the President to take all appropriate action, including retaliation, to obtain the removal of any act, policy, or practice of a foreign government that violates an international trade agreement or is unjustified, unreasonable, or discriminatory and those burdens or restricts U.S. commerce. Section 301 cases can be self-initiated by the USTR or as the result of a petition filed by a firm or industry group. If USTR initiates a section 301 investigation, it must seek to negotiate a settlement with the foreign country in the form of compensation or elimination of the trade barrier. For cases involving trade agreement, the USTR is required to request formal dispute proceedings as provided by the trade agreements. See the U.S. Trade of 1974, *Pub.L. 93-618, 19 U.S.C. § 2411*. In this petition, the main complaint of Chiquita against the EC is that the second category of import licenses for "dollar zone" bananas, only available to those importers that traditionally sell bananas from traditional ACP banana supplying countries, limits its ability to obtain import licenses for "dollar zone" bananas because the company does not sell ACP bananas. See Stovall, J.G., and Hathaway, D.E., (2003), 'US Interest in the Banana Trade Controversy', in *Banana Wars: The Anatomy of a Trade Dispute*, eds. Josling, E.T., and Taylor, T.G. Taylor , CABI Publishing-Oxon/UK, pp. 154-155, see also Rosegrant, S. (1999), *Banana Wars: Challenges to the European Union's Banana Regime*, Kennedy School of Government Case Study, Harvard University Press-Cambridge MA/USA, pp.9-11.

[519]Josling, Tim, (2003), 'Bananas and the WTO: Testing the New Dispute Settlement Process', in *Banana Wars: The Anatomy of A Trade Dispute*, eds. Josling, T.E. , and Taylor, T.G. Taylor , CABI Publishing – Oxon/UK, pp. 177.

countries.[520]The USTR then investigated to determine whether Colombia's and Costa Rica's policies and practice under the Framework Agreement are unreasonable, discriminatory, and burden or restrict the U.S. commerce.[521] Furtherance, the USTR found that the Regulation 404/93 and related rules implementing an EU banana policy, including a restrictive and discriminatory licensing scheme designed to transfer market share to firms traditionally trading bananas from ACP countries and from EU overseas territories and dependencies are considered unreasonable. Thus, the Framework Agreement between the EU and Colombia, Costa Rica, Nicaragua and Venezuela are also discriminatory and unreasonable as applied to U.S. banana marketing companies importing bananas from Latin America. In regard with this complaint, the U.S basically supported the EU's zero-tariff preferences for ACP bananas; it charged that other features of the banana preference scheme violated three basic of GATT rules.

2.1.1. Panel Findings

The first issue was tariff. The complaint against the EU in this issue as described above was the differential tariff rates that applied between third country bananas and non-traditional ACP imports. The EU also did not provide unconditionally low tariffs on bananas from non-traditional ACP countries to bananas from third countries. However, the Panel agreed with the EU's defense that these obligations were excused by the Lomé Convention waiver. Although in the complainant's point of view, tariff allocation was certainly violating the most favored nation principle.

The second was quota issue. In terms of quota, the complaining parties charged that the EU had allocated the banana import quotas in a way that was inconsistent with Article XIII of the GATT. The ACP countries and countries that signed the BFA were granted specific quota, while other countries had no such quotas but had to compete for other quota of imports. The allocation method gave the BFA countries exclusive right to fill any shortfall in supplies under the BFA quotas.[522]Both tariff and quota were significant complaint about by

[520]"Dollar bananas" or dollar zones are principally banana that produced in Latin America and marketed by Chiquita, Del Monte, and Dole which are U.S.-based multinational corporations. Latin American bananas are much cheaper than those of the ACP countries. See Grant, W., (1997), 'The Common Agricultural Policy', *The European Union Series*, St. Martin's Press - New York/USA, pp. 135.

[521]*Ibid*, On December, 1994, Colombia and Costa Rica implemented the Framework Agreement.

[522]The EU subjected them to a per ton duty adjusted each year. In 1995, it was ECU 722, fully ECU 100 fewer than the ECU 822, the EU charged to out-of-quota shipments of bananas from third countries. In 1996-1997, the EU charged a tariff of ECU 693 per ton on over-quota amounts of bananas from non-traditional ACP

complainant parties in Banana dispute, in addition, the licensing system gave expression to be the most severe condemnation by the panel. The licensing system is complex and it tends to lack of transparency which was tendentiously create discrimination. In the complaint to Panel, the complainant parties includes the U.S. claimed that the import licensing system violated Article X of GATT, which required that countries administer trade measure, including licenses, in a uniform, impartial and reasonable manner. Moreover, the EU's licensing system contravened the Agreement on Import Licensing Procedures.

Other charge was the licensing system arrangement violated the TRIMS agreement, which contains a list of trade-related investment measures such as purchasing requirements. The requirement was violating National Treatment principle, since it requires that in order to apply 'B' license in import licensing all the importers or firms have to purchase bananas from the ACP. Furtherance in relations with GATS, the Panel found that the EU regime also violated the non-discrimination and national treatment provisions of the GATS.[523]

2.1.2. Appellate Body Findings

In 1997, the EU then appealed the Panel decision and rulings, both are about findings and legal interpretation of panel. Appellate Body pointed out that if a member could choose a different legal basis for imposing import restrictions, it should avoid the application of non-discrimination rules to 'like' products, then the object and purpose of those rules would be defeated. In this case, Appellate Body upheld the Panel's holding that the chapeau to Article XIII:2 requires a Member restricting imports to aim at a distribution of trade that would exist in the absence of the restriction itself. It conceded that Article XIII:2 (d) sets forth specific rules for the allocation of shares in a tariff-rate quota among Members with 'a substantial' interest in supplying the product concerned, but is not explicit about allocation to Members not having a substantial interest.[524] However, similar to Panel, the Appellate Body stepped to the issue that the allocation of quota to members was lacking a substantial interest also must be subject to the basic principle of non-discrimination. Consequently, it is impermissible to

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suppliers. This tariff was clearly more preferential than the ECU 793 per ton rate applicable to out-of-quota shipments from third countries that took effect on 1 July 1996. The margin of preference, of course, reflected the distinction between ACP and non-ACP countries. Here, then, we see one more part of the pattern: discrimination in favor of ACP countries *vis-a-vis* non-ACP countries. See *EC- Bananas III, WT/DS/27*, 25 September 1997.

[523]Report of the Panel, *EEC-Members States' Import Regimes for Bananas (DS32/R)*, 3 June 1993.

[524]Report of Appellate Body, *European Communities – Regimes for Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 September 1997.

allocate tariff-rate quota shares to some Members who is not having a substantial interest, but not to other Members who also have lack this interest. Hence, violating the non-discrimination rule of Article XIII:1 to the importation cannot be restricted from one Member unless they are similarly restricted from all Members.[525]

In respond to Panel and Appellate Body's report, the EU modified its policy. The new banana was incorporated in Regulations 1637/ of 98 and 2362/98.[526] Then in December 1998, the EU responded to the Panel's ruling by making changes in the import regime for banana. The EU therefore requested a Panel, under Article 21 (5) of the DSU, with the mandate to find that the new banana regime of the EU 'must be presumed to conform to WTO rules unless their conformity has been duly challenged under the appropriate DSU procedures'. However, the U.S. had declared that the changes were not sufficient; it was considered as a unilateral declaration with no WTO significance.[527]

Furtherance, on 14 January 1999, the U.S. announced its intention to suspend concessions to the extent of its loss of banana trade. The U.S. requested of the DSB approval of suspension to the extent of US$ 520 million. The EU protested at the amount of suspension concession, EU argued that the U.S. was not a banana exporter and therefore its rights were not nullified or impaired. Then the EU requested for Arbitration to use the provisions of Article 22 (6) of DSU.

2.1.3. Arbitration Findings

The DSB reconvened the original Panel for arbitration on the issue of the value of concession that the U.S. could withdraw to compensate the loss of trade. Originally the U.S. claimed to suspend concession up to US$ 520 million. However, the Arbitrator should emphasize that the suspension should be appropriate and have regard to the equivalence[528]of

[525]*Ibid*.

[526]Regulation 1637/98 continues the tariff quota of 2.2 million t bound in the EU's schedule and an additional 'autonomous' tariff quota of 353,000 t. The total MFN quota was thus 2.553 million. See Josling, *Supra Note* 519.

[527]The U.S. argued that the new formulation of the quotas in Regulation 1637/98 did not convince the U.S., who argued that the split in the tariff quota between then non-country-specific ACP quota and the allocated MFN quota still contravened Article XIII.22. The reference quantities according to new license procedure were established under the old regulation. Hence, the new regulation still considers discriminatory action inconsistent with WTO rules. See Report of Appellate Body, *European Communities – Regimes for Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 9 September 1997.

[528]Panelist explained according to The New Shorter Oxford English Dictionary on Historic Principles (1993), page 843, the ordinary meaning of the word "equivalence" is "equal in value, significance or meaning",

the impairment suffered. The Arbitrator made calculation regarding the level of nullification and impairment by establishing the WTO-consistent counterfactual and to compare actual trade with this hypothetical situation. After some interchange with the parties to the conflict, the panel finally chose as a counterfactual a situation where the EU established a global quota of 2, 553 million.

However, the Arbitrator decided the level of nullification or impairment that occurred in this term[529].Thus, to estimate the level of nullification or impairment, the Arbitrator has used the same basis needs to be used by the original panel for measuring the level of suspension or concessions.[530]Basically in its initial submission, the U.S. proposed the level of suspension of concession based on counterfactual assumption that the EU would maintain a quota of 857,700 tons for traditional ACP imports and would expand the tariff quota for third country and non-traditional ACP imports to 3.7 million tons, which the U.S. argues would be required in order to make the 857,700 tons quota WTO-consistent. The U.S. also submitted four counterfactuals, including one based on no increase in the overall tariff quota. However, the EU calculated differently regarding some of the specific assumptions used in the U.S. base counterfactual. The EU argued that there were many possibilities of WTO-consistent counterfactuals under which there would be varying effects on the U.S. suppliers.

The Arbitrator calculated the effect on relevant imports of the revised EU banana regime, compared with the reasonable counterfactual that a global tariff quota equal to 2.553

"having the same effect", "having the same relative position or function", "correspondingto", "something equal in value or worth", also "something tantamount or virtually identical". Obviously, this meaning connotes a correspondence, identity or balance between two related levels, i.e. between the level of the concessions to be suspended, on the other hand, and the level of the nullification or impairment to the other. See Decision by the Arbitrators, *European Communities Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by European Communities under Article 22.6 of the DSU, WT/DS27/ARB*, 9 April 1999.

[529]The Arbitration agreed to give authorization to suspend concessions or other obligation as a temporary measure pending full implementation by the U.S. The Arbitration also agreed with the U.S. that this temporary nature indicates that it is the purpose of countermeasures to induce compliance. But the purpose does not mean that the DSB should grant authorization to suspend concession beyond what is equivalent to the level of nullification or impairment, since there is nothing in Article 22 (1) of the DSU, let alone in paragraphs 4 and 7 of the article, that could be read as a justification for counter-measures of punitive nature. See *WT/DS27/ARB*, 9 April 1999, *Supra Note* 528.

[530]The Arbitrator made estimation the level of nullification or impairment at the same basis needs to be used for measuring the level of suspension of concessions. The level is the gross value of U.S. imports from the EU. The comparable basis for estimating nullification and impairment according to Arbitrator is the impact on the value of relevant EU imports from the U.S. (rather than U.S. firm's costs and profits as used in the U.S. submission). More specifically, the Arbitrator compares the value of relevant EU imports from the US under the present banana imports regime as actual situation with their value under a WTO-consistent regime as a counterfactual situation.See*WT/DS27/ARB*, 9 April 1999, *Supra Note* 528.

million tons (subject to a 75 Euro per ton tariff) and unlimited access for ACP bananas at a zero tariff (with the ACP tariff preference being covered as now by a waiver). Because the current quota on tariff-free imports of traditional ACP bananas is in practice non-restraining, this counterfactual regime, thus, would have a similar impact on prices and quantities as the current EU regime. By using the particular methodology and counterfactual calculation, the task is to work on the differences between two scenarios in (a) the U.S. share of wholesale trade services in bananas sold in the EU and (b) the U.S. share of allocated banana import licences from which quota rents accrued. Then by using the various data provided on the U.S. market shares, and the estimation of quota allocation that it would be under the WTO-consistent counterfactual chosen by Arbitrator, it determined that the level of nullification and impairments is US$ 191.4 million per year.[531]

2.2. The Suspension of Tariff Concession up to US$ 191,4 Million to EU Members

On 19 April 1999, the USTR had determined the suspension of tariff concession up to 100% tariff ad valorem, based on the decision of Arbitration on 9 April 1999. Prior to it, the USTR has already announced the preparations for exercising its right to request authorization to suspend tariff concessions on European product since October 1998, if the EU failed to implement the DSB's recommendations and rulings concerning the banana regime. The USTR then announced the list of product items subject to 100% tariff and it also sought public comment on a preliminary list. On December 1998, the USTR announced a revised list of European products for which the U.S. intended to request authorization from the DSB to suspend tariff concession. Furtherance, on 19 April 1999, USTR announced several product items from Austria, Belgium, Finland, France, the Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, Portugal, Spain, Sweden or the United Kingdom are subject to 100% tariff ad valorem. The suspension on tariff concession was implemented in order to rebalance the nullification and impairment cost due to EU Banana regime up to US$ 191, 4 million per year.

Below the product item subject to 100% tariff ad valorem[532]

Bath preparations, other than bath salt
Handbags, whether or not with shoulder strap, including those without handle, with

[531] *Ibid*

[532] Federal Register, Vol. 64, No. 74, Monday, April 19, 1999, Notices.

outer surface of sheeting of plastic
Pecorino cheese, sweet biscuits, waffles and wafers
Articles of a kind normally carried in the pocket or in the handbag, with outer surface of sheeting of plastic, of reinforced or laminated plastics
Uncoated felt paper and paperboard in rolls or sheets
Folding cartons, boxes and cases, of non-corrugated paper or paperboard
Lithographs on paper or paperboard, not over 0.51 mm in thickness, printed not over 20 years at time of importation
Bed linen, other than knit or crocheted, printed, of cotton, other than containing any embroidery, lace, braid, edging, trimming, piping or applique work, not napped
Lead-acid storage batteries, other than of a kind used for starting piston engines or as the primary source of electrical power for electrical powered vehicles Electrothermic coffee or tea makers, of a kind used for domestic purposes

2.3. The Impact of 100% Tariff Ad Valorem to Two EU Private Economic Actors.

The product items listed in the table above was mostly snapping some of non-banana related companies, because the tariff was imposed on their products. The U.S. government has drawn up a list of predominantly French and British produced items, since French and the U.K. are the main EU banana producers. However, other companies from countries such as Austria, Belgium, Finland, Germany, Greece, Ireland, Italy, Luxembourg, Portugal, Spain and Sweden were also subject to the retaliation, except Netherland and Denmark were exempted from retaliation because those countries did not support EU Banana rulings. The total value of the exports affected over all is estimated at around £500 million, or 700 million euros. Although the impact of punitive tariff affected to both the U.S. exporters and the EU importers and producers, but the most immediate impact occurred in Europe, where long established but small industries were facing devastation.[533]

The following sub section describes examples of the impact of 100% tariff imposed by the U.S. government to some private economic actors in the EU territory, such as cashmere wool producer and importer in the U.K., pecorino cheese producer, and batteries producers. Amongst these private economic actors, FIAMM Company (producer of batteries) brought the trade impact of the U.S. retaliation before General Court and appealed before the European Court of Justice. From the court judgment, it is necessary to analysis the legal implication of WTO retaliation to FIAMM Company.

[533] James, Steve, *Banana War Threatens Jobs and Heralds Wider Trade Conflicts*, 20 January 1999, available at : (http://www.wsws.org/articles/1999/jan1999/ban-j20.shtml)

2.3.1. Cashmere Wool

Right after the USTR announced to impose a 100% tariff ad valorem rate of duty on the cashmere wool produced in the UK, the Scottish cashmere producer estimated to lose approximately £ 1.25 million from export to the U.S. The cashmere wool industry which is 50% centered in the Scotland borders area was also facing to lose almost £20 million in sales for twenty Scottish companies, as part of an estimated £ 82 million in lost trade from the U.K. itself. The impact of high tariff to cashmere wool industry was more tangible and unnerving at small companies in the border region between Scotland and England. Before retaliatory action was implemented, the cashmere producers usually pay normal tariff of 6, 5%, but with a 100% tariff, the companies will have to pay the difference themselves.[534]

2.3.2. Pecorino Cheese

One of the items in the list is pecorino cheese, a cheese produced in Italy. Imports of Pecorino cheese from Italy account about 20-40% of total the U.S. imports in the U.S. market. When the U.S. imposed 100% ad valorem tariff, the Pecorino cheese company estimated losses at 1.72 times than of U.S. consumer. The calculation of loss for Pecorino cheese was US$ 4.96 million in consumer surplus loss per year as a result of the U.S. retaliatory policy. The U.S. collected US$1.86 million in tariff revenue and US$3.10 million was the dead weight loss. Thus, Pecorino producers lost US$8.55 million in revenue from the decline in exports to the U.S.[535]

Nevertheless the trade impact of the U.S. retaliation to some EU companies considers as small trade impact. The U.S. reduces import from EU by US$ 116.8 million according to retaliation lists of products. The estimation on economic effect of the U.S. retaliation is divided in to four categories. First, the retaliation reduces export percentage for EU only -0.105096%. Second, it reduces GDP nominal up to -0.003803%. Third, for the GDP real, it reduces up to -0.000143%. Fourth, total welfare in regard with the U.S. suspension of tariff concession is up to only -0.000671.[536] To this end, the EU has seen that the level of trade restrictions and amount of trade impairment to those economic actors are small. The EU

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[534] Andres, Edmund L., *Bewildered Europeans Deplore 100% U.S. Tariff*, the New York Times, March 5, 1999.

[535] Heboyan,Vahe,Ames, Glenn C.W., and Epperson, James E., (2002), 'U.S.-EU Banana War: Implications of Retaliatory Tariff on Pecorino Cheese', *Journal of Euromarketing*, Volume 11, Issue 3, pp.53-69.

[536] Breuss, Fritz, (2004), 'WTO Dispute Settlement: An Economic Analysis of Four EU-US Mini Trade Wars', *Journal of Industry, Competition and Trade* No. 4, pp. 296.

therefore keeps maintaining the banana regime, despite the trade impact from the U.S. retaliation for several EU companies until 2001.[537]

In 2000, some companies who are affected by the U.S. retaliatory tariff, submitted political communication to the EU Commission in order to request EU to comply with the DSB Decision, and request Commission to negotiate with the U.S. government to lift sanctions against the EU. After numerous contacts with these companies, including banana producers and operators, the Commission therefore submitted a proposal to the Council to resolve the long lasting banana dispute. In 2001, the Council initiated to modify EU Banana regime by issuing Council Regulation (EC) No. 216/01 of 29/1/2001. The regulation to modify EU banana regime is divided into two phases. Phase I: A modified banana regime based on historical allocation of licenses entered into force on 1 July 2001 with the adoption of the Commission Regulation no 896/01. Phase II: from 1 January 2002, 100.000 tons are transferred from C quota to the B quota (to all suppliers), and the remaining 750.000 tons of the C quota are reserved for the ACP bananas.

In April 2001, the U.S. Government and the European Commission reached an agreement to resolve their banana dispute, since the EU promulgates the new banana regime which will provide a transition to a tariff-only system by 2006. During the transition, bananas will be imported into the EU through import licenses distributed on the basis of past trade. Accordingly in July 2001, the U.S. government suspended the retaliatory tariff imposed against EU imports since 1999.

Although the U.S. has lifted the retaliatory tariff in 2001, but retaliatory tariff imposed from 19 April 1999 until 30 June 2001 is borne negative impact to several companies in the EU.[538] For this impact, some companies such as FIAMM Company and Fedon Company seek recourse to the European Courts for their rights of compensation.

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[537] *Ibid*, pp. 296-97. Breuss argued the reason for the EU to give in all to the retaliation without considering trade impact of retaliation, because first, the EU wanted to be fair partner with especial interest. Second, the EU eager to sustain the credibility of the binding nature of the dispute settlement system, if it is not, other WTO members could have argued that the EU itself disregarded the WTO adjudication body decisions.

[538] See Case T-320/00 *Cartondruck v. Council and Commission* (2005) ECR II-00027, Case T-383/00 *Beamglow Ltd v European Parliament and Others (Spain, intervening)* (2005) ECR II-05459, Case T-135/01 Fedon&Figli and Others v Council and Commission (2005) ECR II-00029, Case T-151/00, *Laboratoire du Bain v Council and Commission* (2005) ECR, II-23, and Case T-301/00, *GroupeFremaux SA v Council and Commission* (2005) ECR, II-25.

2.4. The Implication of WTO Retaliation to Private Economic Actors in the EU

Besides FIAMM and Fedon Company, there were five cases regarding the implication of WTO retaliation to private economic actors in EU. These cases were dismissed by the GC because the requirement of non-contractual liability base on Article 340 TFEU did not meet in these cases.[539] For example, the GC dismissed the complaint claimed by *Beamglow* Company because the damage is not considered as unusual damage.

2.4.1. *Beamglow* Ltd Case

The increased customs duties was affecting *Beamglow* Ltd., a company established in the UK, who produces folding boxes which fell within the category of "folding cartons, boxes and cases of non-corrugated paper or paperboard" in the list issued by USTR. The company claimed that the EU Institutions have to pay compensation in the sum of GBP 1,299,632, because the damage suffered by the company is due to failures at every stage in the process for changing the EU regime governing the import of bananas and, consequently, to the part played by all the EU Institutions involved, including the EU Parliament.[540] The reason for *Beamglow* to file suit against EU Parliament before the GC is because this institution was consulted before the adoption of Regulations 404/93 and 1637/98 which were declared incompatible with the WTO Agreements. The EU Parliament possessed, but failed to exercise, the right to submit any appropriate proposal on matters which it considered to require an EU Act. Various opinions, resolutions and interventions of the EU Parliament eventually stressed the need to prevent the disastrous effects of the WTO rules for the producer regions of the EU. Accordingly, the EU Parliament is liable to pay compensation subject to non-contractual liability regime pursuant to Article 288 TEC (340 TFEU).[541]

However, the EU Parliament contested the claim because the company does not in any way establish how the Parliament could have rendered the EU Institutions liability. In any event, the Parliament cannot be considered responsible for the alleged damage given its lack of competence to decide the terms of the EU Agricultural legislation at issue or to adopt measures capable of causing, preventing or mitigating the alleged damage. The resolutions

[539]Ibid

[540]Case Beamglow, *Supra Note* 481, para. 60-61

[541]Ibid, para. 67

adopted by the Parliament were merely a reflection of the exercise of its general power of debate.[542]

In this case, the GC held that the company seeking compensation is justified in bringing their action against the EU, as represented by the Commission and the Council, according to Article 37 TEC (Article 43 TFEU). The EU Agricultural Legislation whose unlawfulness is claimed to be at the origin of the damage alleged. But the above provision does not confer any decision-making power on the Parliament and allows it to act only as a consultative organ in the course of the procedure for the adoption by the Council alone of the regulations, directive and decisions relating to the common agricultural policy. The opinion which the Parliament gave on that basis concerning the proposal submitted to it that led to Regulation 1637/98 was not therefore in any way binding.

The company then claimed on the basis of the infringement of the protection of the legitimate expectations, legal certainty and proportionality, and on the infringement of its right to property and its right freely to pursue its economic activity, all rest on the premise that the conduct of which the EU Institutions are accused is contrary to WTO rules.[543] However, the GC dismissed this complaint because the EU Courts only review the legality of the conduct of EU Institutions. It follows that the conduct of EU Institutions cannot be regarded as unlawful and there is no need to consider the company arguments relating to the legal nature of the provisions and principles claimed to be infringed and to the alleged gravity of their infringement. Moreover, the Company has established neither the nature nor the basis of the measures which it accuses the EU Institutions of not having adopted for its protection. And the omission by the EU Institutions can give rise to liability on the part of the EU only where the institutions have infringed a legal obligation to act under a provision of the EU Law.

Finally in relation to the requirement of non-contractual liability base on Article 340 TFEU, the GC then held that when damage is caused by the conduct of EU Institutions not shown to be unlawful, the EU can incur non-contractual liability if the conditions as to sustaining actual damage is fulfilled. In this case, the company has not established that it was impossible to mitigate its losses by putting up its prices or redirecting its export policy and that it has provided no explanation concerning the measures that it could have taken to limit the damage. The EU Institutions implicitly conceded that the company must, at the very least,

[542]Ibid, para. 65

[543] Ibid, Para 165

have necessarily suffered commercial damage by reason of the incontestable rise in the price of its product caused, on the US marker, by the sudden increase of the US ad valorem import duty to 100 per cent. It thus, the requirement of existence a sustain actual and certain damage is satisfied. Moreover, the GC also examined whether there is causal link between the damage suffered and the conduct of the EU Institutions. For this requirement, the GC held that it is true that the conduct of the EU Institutions necessarily led to the adoption of the retaliatory measure by the U.S. Authorities in compliance with the procedures established by the DSU and accepted by the EU, so that their conduct must be regarded as the immediate cause of the damage suffered by the company following imposition of the U.S. increased customs duty. It must therefore be accepted that the requisite direct causal link exists between the conduct on the EU Institutions and the damage suffered by the *Beamglow* Company. However, the GC held that the requirement for the unusual and special nature of the damage is not fulfilled, since the suspension of concession of tariff provided by the WTO Agreements is among the vicissitudes inherent in the current system of international trade. Accordingly the risk of this vicissitude has to be borne by every operator who decides to sell their products on the market of one of the WTO Members. It thus the risks to which the marketing by the company of its folding paperboard boxes on the U.S. market could be exposed are not to be regarded as beyond the normal hazards of the international trade as currently organized. It concludes that the damage suffered by the company cannot be classified as unusual.[544]

The *Beamglow* case is one of the examples that GC abandon the claim regarding infringement of individual right that occurred as well in FIAMM case. The FIAMM case will be discussed in the next sub section below.

2.4.2. FIAMM's Claim before the General Court

FIAMM case is a notorious case regarding the legal consequences of WTO retaliation to FIAMM Company due to suspension tariff resorted by the U.S. government. This company should pay statutory rate from the time of actual payment to the U.S. customs authorities of the 96.5% duty increase in exporting lead-acid storage batteries[545]. Due to the increase of duty payment, FIAMM lost its benefits up to EUR12 .139. 521.[546]They believed that the EU is liable for the damage suffered by them as a result of their products being among those

[544]Ibid, para. 199, 214-215

[545] See the table of list of product subject to 100% tariff ad valorem, Federal register, *supra Note* 532

[546] FIAMM Case Supra Note 478 , para. 60-62

subject to the increase of customs duty imposed by the U.S. authorities between 19 April 1999 and 30 June 2001. FIAMM Company sued the Council and the Commission before the GC in actions for compensation, based on Article 235 EC Treaty (Article 268 TFEU) in conjunction with the second paragraph of Article 288 EC Treaty (Art. 340 TFEU).[547]

The main claims are:[548]

1) Court should order the defendants (The Council and The Commission) to pay damages amounting to EUR10, 760,798.35 or such other sum as the Court considers reasonable, subject to updating in the course of the proceedings, together with interest at the Italian statutory rate, until final settlement, and default interest at the rate of 8% in the event of delay, after delivery of judgment.
2) The total loss of FIAMM Company solely by reason of payment of the increased customs duty is EUR 12, 139, 521.

In order to prove that the EU Institutions are liable for the damage suffered by the company, FIAMM (the applicant) complain that the damage caused to them is because the EU Institutions failure to adopt, within the period laid down by the DSB, provisions appropriately amending Regulations 404/93, in breach of the obligations entered into by the EU under the WTO Agreements. The applicants state that it is a matter purely terminology whether the EU infringed WTO rules deliberately, through the adoption of the EU provisions, or by omission, because of the failure to bring those provisions into conformity with the WTO Agreements.[549] Accordingly, the applicant's claims for compensation based on non-contractual liability of EU for the unlawful conduct of EU Institutions. The applicant also seek the application by analogy of the rules governing non-contractual liability that are applicable to the Member States where the ECJ finds under Article 226 TEC (Article 258 TFEU) that they have infringed their EU obligations. The applicant also relies on the rules governing the non-contractual liability that the EU may incur even in the absence of unlawful conduct of its institutions.[550]To this end, the applicant concerns on three basis claims pursuant to principle

[547] Article 235: The Court of Justice shall have jurisdiction in disputes relating to compensation for damage provided for in the second paragraph of Article 288.

[548]FIAMM Case, *Supra Note* 478.

[549] FIAMM Case *Supra Note*478, para. 65-66

[550]Ibid, para. 84

of non-contractual liability. First, liability of the EU for unlawful conduct of its institutions, second, the legal nature of the rules of law allegedly infringed by the EU Institutions and third, the seriousness of the alleged breaches.

1) Liability of the EU for unlawful conduct of its institutions

In this context, the applicant complains that the increased duty imposed by the U.S. Government, which is causing them serious damage, is the direct consequence of the unwilling of the EU Institution to bring the EU regime governing the import bananas into conformity with the WTO Agreements.[551] In addition, the EU also considered violating the certain fundamental principle of EU law, including the principle *pactasuntservanda,* because the EU has failed to fulfill its obligations as a WTO member, in regard being had to the binding nature of the WTO agreements and the DSU.

The defendants have also infringed the principles of the protection of legitimate expectations and legal certainty which must be inherently enjoyed by every citizen. The applicant claims that they had a legitimate expectation that the tariff concessions negotiated with the U.S. in the form of the original import duty at the rate of 3.5 per cent would continue to apply, but that those concessions would not be altered because of the EU Institutions conducted unlawful measures. However, the EU did not bring its legislation into line with WTO rules even though it had assured its trading partners of its intention to comply with the ruling and recommendation of DSB, and it had obtained an exceptional extension of the period granted for the purpose. It is thus deemed as the infringement of the principle of proper administration. The EU Institutions also infringed the right to property and right to pursuit of an economic activity, which is protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), because the applicants were compelled to pay prohibitive customs duty on their imports of batteries in to the U.S. and to relocate their product facilities.[552]

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[551] FIAMM Company has been discriminated against *vis-a-vis* the other undertakings penalized by the retaliatory measures since they bear by themselves, nearly 6% of the total sum of US$ 191.4 million specified in the decision of the US Government imposing the retaliatory measures. The discrimination occurred to the company since the retaliation could be implemented to all Community undertakings but not only to industrial batteries. See FIAMM Case, *Supra Note* 478, para. 193-195.

[552] FIAMM Case Supra Note 478 Para 93 - 94

2) the legal nature of the rules of law allegedly infringed by the EU Institutions

The principle legitimate expectation, legal certainty and proper administrations infringed by the defendants are superior in rank and they are designed to protect individuals. The Council and The Commission therefore allegedly infringed the legal nature of the rules of law. Regarding this principle, the applicants considered that they have right to maintain export to the US at the reduce import duty of 3, 5%.[553]

3) the seriousness of the alleged breaches

The applicant contends that the breaches committed by the defendants are sufficiently serious to be able to give rise to non-contractual EU liability. The degree of clarity and precision of the infringed rules of law should be noted, as should the lack of discretion allowed to the EU Institutions for bringing the incompatible EU legislation into conformity with the WTO Agreements, especially DSB Decision and Rulings. Besides, the EU Institutions has persisted in its breach of the WTO Law and, therefore, EU Law, even after expiry of the 15-month period which it was granted by the WTO Arbitrator to comply with the WTO Rules.[554]

On the contrary, the defendants counter claims are:[555]

1) The WTO Agreements create rights only in favor of the contracting parties, to the exclusion of individuals. The same true of DSB decisions, which merely interpret WTO rules. It designed to regulate and manage international trade relation between subjects of international law only. Tariff concessions agreed to by WTO members allow access to a national market without guaranty such access or a specified price level on that market, or directly conferring on businesses the right to a given tariff treatment or a right enforceable against EU institutions.
2) The EU somehow is tolerating the suspensions of the U.S. concessions temporarily, during the period needed for finding a solution to the banana dispute.[556]

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[553]Ibid, para. 91

[554] Ibid, para 105

[555]*Ibid*

[556]*Ibid*,

3) The WTO Agreements cannot be relied upon by the applicants, nor can it be pleaded that the principle *pactasuntservanda* has been infringed or that a legitimate expectation that those agreements would be complied with has been thwarted.
4) The defendants contend that they did not exceed the limits of their discretion in particular because the situations to be resolved were complex and application and interpretation of the provision at issues were difficult. The Regulations No 1637/98 and No 2362/98 is procedures that initiated by the U.S. government, it cannot be complained since it established an EU import regime different from the original regime.[557]
5) The defendants also argued that the suspension of concession according to Article 22 of the DSU constitutes the best solution after full implementation of the DSB's recommendations. And based on Article 3 (7) of the DSU, the selection of a mutually agreed solution has the effect of conferring a wide discretion on the competent authorities of WTO members enabling them to break free, even if only temporarily, from their obligations arising from the WTO Agreements.[558]
6) In the context of causal link related to damage, the defendants deny that there is any causal link between the damage alleged and their conduct. The increased customs duty is not consequence of their action but a unilateral act of the U.S. Government, which resulted in the delimitation of the circle of EU business that affected. The U.S. authorities could have chosen products other than batteries and they also exempted from their increased customs duty products originating in certain Member States of the EU. The level of tariff increase was likewise set by the U.S. Government acting with entire freedom.[559]

2.4.3. The General Court Findings

After reviewing the claim and counterclaims submitted by the parties, the GC came to the conclusion on their findings.

1) The preliminary question as to whether the WTO rules may be relied upon

The Court decides that the principle *pactasuntservanda* cannot be asserted against the defendants in this case. The WTO Agreements are not in principle, given their nature and structure, among the rules in the light of which the EU Courts review the legality by the EU Institutions. It is because first, the WTO Agreements is founded on reciprocal and mutually

[557] *Ibid*, para. 106

[558] *Ibid*, para. 107

[559] *Ibid*, para. 173

advantageous arrangements which distinguish it from those agreements concluded between the EU and non-Member States that introduce a certain asymmetry of obligations. Other WTO counterparts also do not include the WTO Agreements among the rules by reference to which their courts review the legality of their rules of domestic law. Hence, if the Court reviews the legality of actions of the EU Institutions in the light of WTO Agreements, it could lead to an unequal application of the WTO rules which are depriving the legislative and executive organs of the EU. And second, the Article 22 of the DSU urges the disputant party to enter into negotiated arrangements in order to arrive at mutually acceptable compensation. The Court thus refrain from applying rules of internal law which are incompatible with the WTO Agreements that would have the consequence of depriving the function of legislative or executive organ to conduct negotiation in terms of WTO dispute.[560]

2) Liability of the EU for unlawful conduct of its institutions

The complaints based on breach of the principles of the protection of legitimate expectations and of legal certainty, on infringement of the right to property and to pursuit of an economic activity and, on failure to observe the principle of proper administration all rest on the premise that the conduct of which the defendants institutions are accused is contrary to WTO rules. Those rules are not among the rules by reference to which the EU Courts review the legality of the EU Institutions conduct; these complaints therefore are rejected. Since it has not been proved that the conduct of which the defendant institutions are accused was unlawful, one of the three cumulative conditions of non-contractual liability of the EU for unlawful conduct is not met.

3) Liability of the EU in the absence of unlawful conduct of its institutions

The Court then led to the examination of non-contractual liability of the EU in the absence of unlawfulness. It requires the actual damage that has been suffered, a causal link exists between the damage and the conduct of EU Institutions, and the damage is unusual and special in nature.

3.1.) the existence of actual and certain damage

The applicants submit that the damage to them is comprised by, first, the 96.5 per cent increase in the import duty levied by the U.S. Authorities on the imports of batteries into the U.S. market, and second, the costs incurred in respect of the setting up and the relocation of production units those products which they were compelled undertake in response to that trade retaliation measure. To this must be added losses of turnover resulting from

[560]Ibid, para.110 -112. See also Portugal v. Council *Supra Note* 469.

reconversion of the production units in question. The applicants also stated that by expediting the establishment of a battery production unit in the U.S. and by converting a site in another non-Member State into a factory for the manufactures of batteries, they had been able to reduce to a minimum the adverse impact of the increased customs duty and to save their share of the U.S. market. The applicants therefore did not lose sale volumes, but suffered only pecuniary loss.[561]

On the other hand, the defendants counter by stating that the sales contracts between the applicants and their U.S. customers provide for variation of the price of their products. The applicant also was responsible for the financial advantages allegedly resulting from the increased customs duty, which it actually added in the distribution agreement, under which the prices agreed with the purchaser based on the free on board clause. It places the risk of variation of the customs duty on imports exclusively with purchaser. The Applicants is able to export their batteries to other countries, in order to avoid loss of profit.[562]

The court in this matter decided that, first is that the applicants have suffered economic loss that is not the result of their own decisions which do not deny by the defendants. Second is that in particular, the defendants accept that the distribution contract concluded by the applicants has effect of placing the risk of variation of the customs duty on imports exclusively with the purchaser. It means they cannot deny that the applicants must have necessarily suffered commercial damage by reason of the incontestable rise in the price of their products caused on the U.S. market, by the sudden increase of the U.S. ad valorem import duty of 100 per cent. To that extent, the Courts find that the condition requiring the applicants to have sustained actual and certain damage is satisfied.[563]

3.2) the causal link between the damage suffered and the conduct of the institutions

The applicant emphasized that the damage suffered because the EU Institution was unwilling to bring the incompatible EU legislation into conformity with the WTO Agreements, meanwhile the U.S. Authorities will not concern about which EU business might be affected, since they have right to designate the sectors in question or to react with the other options provided for or allowed by the WTO Rules.[564]

On the contrary, the defendants deny that there is any causal link between the damage

[561]FIAMM Case, *Supra Note* 478, para. 162-163

[562] Ibid, para 164-165

[563]Ibid para. 166-170

[564]Ibid para. 171 – 172

alleged and their conduct, because the increased duty is not consequence from their action, but the unilateral act of the U.S. which resulted the delimitation of the circle of EU business affected. The EU Institutions cannot therefore be responsible for the imposition of a disproportionate burden on the business concerned. The relationships between the regulations on banana regime with the applicant's decision to pat the increased customs duty do not exist. There is not obligation derive from the EU measure to export to the U.S. or to continue to export in the new circumstances.[565]

The Court finds that if there were not for the existence of the EU regime governing the import of bananas which according to the finding of the DSB is incompatible with the WTO Rules, the U.S. would not have been able to seek or obtain the DSB authorization to suspend its tariff concession on products originating in the EU. The unilateral decision by the U.S to impose customs duty on imports of batteries is not therefore such as to break the causal link that exists between the damage which the imposition of that increased duty caused to the applicants, and the defendant's retention of the banana import regime at issue. The conduct of the defendant institutions led to the adoption of the retaliatory measure by the U.S. Authorities is regarded as the immediate cause of the damage suffered by the applicants. It must therefore be accepted that the direct causal link exist between the conduct of the defendants and the damage.[566]

3.3) the unusual and special nature of the damage suffered

Similar to *Beamglow* case, the court is contrary to the argument with of the applicant. According to the court, the applicant is wrong in contending the possibility of retaliatory measures being implemented by a non-Member States is considered to be an unusual risk, since the tariff concession that is suspended as provided for by the WTO Agreements is among the vicissitudes inherent in the current system of the international trade. It follows that the risks to which the marketing by the applicants of their batteries on the U.S. market could not be considered as beyond the normal hazards of the international trade as currently organized, because the damage did not exceed the limits of the economic risks inherent in operating in the sector concerned and, it does not affect a particular circle of economic operators in a disproportionate manner by comparison with other operators.[567]

[565] Ibid para 174-176

[566]Ibid para. 185 -191

[567]Ibid para 205-209.

2.4.4. FIAMM's Claim before the European Court of Justice.

Notwithstanding the FIAMM claim is dismissed by the GC, this company appealed before the European Court of Justice (ECJ) along with *Fedon* (company produces spectacle case).[568] In principle there are two pleas submitted by FIAMM and Fedon (the applicants), firstly, they submit that the GC judgments lack reasoning and are unfounded so far as concerns one of the main arguments regarding direct effect of DSB Decision which is underlying their respective applications for damages by reason of unlawful conduct of EU Institutions. Secondly, the applicants submit that the damage incurred by them was unusual in nature, however, the GC reject their claim for compensation founded on a liability regime applicable in the absence of unlawful conduct of EU Institutions. The GC gave reasons that were insufficiently explained, illogical and at variance with the relevant settled case law.[569]

2.4.5. The European Court of Justice Findings

After hearing argumentations from the parties, the ECJ made some points in their judgments.

1) The direct effect of DSB Decision

The ECJ held that the applicants did not assert relating to the possible direct effect of DSB decision in the section of those applications intended to establish that an infringement of the WTO Agreements by the EU Institutions can be relied upon. The applicants instead seeking to demonstrate that the higher-ranking rules of law which are thus alleged to have been infringed, and which includes, in particular, the principle of *pactasuntservanda*. The applicants also argued that WTO agreements are intended to protect individuals, so that there would be compliance in regard with one of the condition on liability of the EU for unlawful conduct. The applicants simply submitted that, if direct effect and the resulting status of a rule protecting individuals were not to be accepted in the case of WTO Agreements, they should be as regards decision of the DSB. The applicants did not state with the clarity and precision in their applications to GC that the direct effect may attach to decisions of the DSB in order to justify the establishment of failure to comply to them. The exception to the principle is that the WTO agreements cannot be relied upon for the purposes of reviewing the legality of secondary EU legislation.[570] The ECJ also upheld the decision of GC that the expiry of the

[568] Joined FIAMM &Fedon, *Supra Note* 9.

[569] Ibid, para 58-59

[570] Ibid para 89 – 97

period time allowed for the EU to bring banana import regime into conformity with DSB's Decision on 25 September 1997 had not resulted in exhaustion of the methods for settling the dispute provided in DSU. In this connection, the review of the EU legality measures could have the effect of weakening the position of EU negotiators in the search of mutually acceptable solution to the banana dispute in WTO.[571]

The ECJ held that referring to the GC analyses, the applicants were wrong in inferring from Articles 21 and 22 of the DSU that the WTO Member is obliged to comply within a specific period, with the recommendations of DSB. The ECJ thus held that the applications' assertion about direct effect should be accorded to DSB recommendations and ruling one the period of time allowed for their implementation has expired, must be declared unfounded.[572]

2) Non contractual liability of EU Institutions

The ECJ declared that the interpretation of second paragraph of Article 288 EC Treaty (Article 340 TFEU) means the non-contractual liability of the EU and the exercise of the right to compensation for damage suffered depend on the satisfaction of a number of conditions, relating to the unlawfulness of the conduct of which the institutions are accused.[573]In the context of non-contractual liability, the Court opined that in order to be successful on a claim begins as non-contractual liability actions are subject to the requirements set out in the *Francovich Case*[574], and further codified in *Brasserie du Pêcheur*and also *Bergaderm*.[575]The requirements have been declared by the GC judgment that it should be an unlawful conduct of EU institutions, causal link between the damage and the unlawful conduct, and serious breach of law relating to the rights of individuals. According to ECJ, if there is no act or omission by an institution of an unlawful in nature, so that the first condition for non-contractual of EU liability under the second paragraph of Article 288 EC (Article 340 TFEU) is not satisfied, they may dismiss the application in its entirety without being necessary for them to examine the other precondition of EU liability, such as the fact of damage and the existence of a causal

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[571]Ibid para 101.

[572] Ibid para 102 – 103

[573]*Ibid*, para.164.

[574]Joined Cases *Francovich Supra Note 15*

[575]Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. BundesrepublikDeutschland*, 1996 E.C.R. I-1029 [hereinafter Brasserie].

link between the conduct of the institutions and the damage complained of. The ECJ then stated that the strict approach taken towards the liability of the EU in the exercise of its legislative activities is attributable to two considerations. First, the legality of measure is subject to judicial review when it may adversely affect individual interest. Second, in a legislative context characterized by the exercise of a wide discretion, which is essential for implementing a EU policy, the EU cannot incur liability unless the institutions concerned has manifestly and gravely disregarded the limits on the exercise of its power.[576]

The ECJ then refer to the examination of GC regarding the liability of EU Institution based on absence of unlawfulness act. Although the ECJ admitted that in *Dorsch* Case, there were specific conditions under which liability could be incurred even with the absence of unlawfulness of conduct of EU Institutions, and the court is allowed to infer that it had established the basis and principles of such a regime.[577] But EU law does not support liability of EU for conduct which fails to comply with the WTO Agreements. It must be concluded that, as EU law currently stands, no liability regime exists under which the EU can incur liability for conduct falling within the sphere of its legislative competence in a situation where any failure of such conduct to comply with the WTO Agreements cannot be relied upon before the EU Courts.

3) The existence of infringement of general principle of law and fundamental right

In respect to the existence of breach the rule of law relating to protection of the right of individual, the Court opined that the right to property and the freedom pursue a trade of profession do not constitute absolute rights. The Court has long recognized that they are general principles of EU law, while pointing out however that they do not constitute absolute prerogative, but must be viewed in relation to their social function. In the context of a common organization of the market, condition that correspond to objectives of general interest pursued by the EU do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference infringed upon the very substance of the rights guaranteed. It follows that a EU legislative measure whose application leads to restrictions of the right to property and the freedom to pursue a trade or profession that impair the very substance of those rights in a disproportionate and intolerable manner, perhaps precisely because no provision has been made for compensation calculated to avoid or remedy that impairment could give rise to non-contractual liability on the part of the EU. The Court then

[576]Ibid

[577]Dorsch Consult Case Supra Note 441, para. 18.

adjusted that an economic operator cannot claim a right to property in a market share which he held at a given time, since such a market share constitutes only a momentary economic position, exposed to the risks of changing circumstances. The Court also stated that the guarantees accorded by the right to property or by general principle safeguarding the freedom to pursue a trade or profession cannot be extended to protect mere commercial interest or opportunities to the uncertainties of which are part of the very essence of economic activity. The Court also gave reason that an economic operator whose business consists particularly in exporting goods to the markets of non- EU member States must therefore be aware that the commercial position which he has at a given time may be affected and altered by various circumstances include the possibility, which is moreover expressly envisage and governed by Article 22 of the DSU, that one of the non- EU member states will adopt measures suspending concessions in reaction to the stance taken by its trading partners within the framework of the WTO and for this purpose will select in its discretion, as follow from Article 22 (3) (a) and (f) of the DSU, the goods to be subject to those measures.[578]

The Court has held that EU law as it currently stands does not provide for a regime enabling the liability of the EU for its legislative conduct to found an action in a situation where any failure of such conduct to comply with the WTO agreements cannot be relied upon before the EU courts. The claim for compensation by the applicants sought in particular to put in issue the liability of the EU for such conduct. The ECJ also declared that is no need to examine the plea concerning the unusual nature of damage allegedly suffered by the applicants. In addition, the plea is dismissed because it is lack of certainty of damage and lack of a causal link between that damage and the conduct of EU institutions.[579]

3. Legal Analysis of the FIAMM Case

3.1. The Lack of Direct Effect of WTO Obligations

In order to analyze the implications of WTO retaliation to FIAMM and Fedon Companies from legal perspective, it is necessary to put hierarchy point in this case. The major point is the absence of direct effect of WTO Obligations including DSB Decision, why

[578] *Joined Case FIAMM &Fedon Supra Note 9,* para 183-186. The Court refer to some cases inter alia Case 265/87 *Schräder HS Kraftfutter* [1989] ECR 2237, paragraph 15; *Germany* v *Council*, paragraph 78; and Case C-295/03 P *Alessandrini and Others* v *Commission* [2005] ECR I-5673, paragraph 86, and Case 4/73 *Nold* v. *Commission* [1974] ECR 491, paragraph 14).

[579] Joined Cases FIAMM &Fedon,*Supra Note* 9, para. 189-90

should put it on the major point? Since this research is relating to the implication of WTO retaliations to private economic actors, it should be bold asserted by these private economic actors that direct effect of WTO Law is necessary. In both GC and ECJ proceedings, FIAMM and Fedon attempted to settle the case law by advocating the direct effect of the DSB decision finding that the EU on imports of bananas had breached international trade law. They persuaded the GC that the Nakajima exception was applicable.[580] According to those applicants the unlawful conduct alsoexistssinceEU Institutions was failure to comply with a DSB decision within the reasonable period of time allowed by the DSB. However the concept direct effect is not an easy task to comply both from the applicant and the court itself, it involves political challenge. It is because first, the other WTO Member such the U.S. do not recognize concept of direct effect. Second, the Court understands that the DSU negotiations continue to occupy a prominent position. Third, the DSU itself allows WTO members to implement DSB Decisions in several methods. Forth, it is political freedom of EU Institutions that they have limitless scope to imply the DSB Decision.[581]

The analysis continue to the inconsistency of applying direct effect in case *per se*. FIAMM and Fedon Company are supposed to be able to rely on *Nakajima* and *Fediol Doctrine*[582] in order to obtain direct effect reassurance, since the ECJ in a particular case recognize direct effect of WTO Law. For example, in *Dior Case*, the ECJ has opened the door for individuals to rely directly on any provision of WTO law that falls within the competence

[580] For further comparison, See Case C-69/89, *Nakajima All Precision Co. v. Council of the European Communities*, 1991 E.C.R. I-2069. The ECJ in the Nakajima case refers expressly to precise provision of the WTO Agreements, when the ECJ rules that the Anti-Dumping regulation that questioned by Nakajima Company was adopted in order to comply with the Anti-Dumping Code of the GATT. Thus, the ECJ interpreted the provision of the Anti-Dumping Code to find out whether the EC regulation was in conformity with the GATT. See also Zonnekeyn, Geert A., (2003), 'The ECJ's Petrotub Judgment: Towards a Revival of the 'Nakajima Doctrine', *Legal Issues of Economic Integration Journal*, Vol. 30, No. 3, pp. 256.

[581]Dani, Marco, (2010), 'Remedying European Legal Pluralism: The FIAMM and Fedon Litigation and the Judicial Protection of International Trade Bystanders', *European Journal of International Law*, Issue Vol. 21, No. 2, May – 2010, pp. 309. Marco Dani emphasized that in the matter of limitless scope to imply the DSB recommendations by EC Institutions, innocent bystanders such as FIAMM and Fedon will ultimately pay the price of their political freedom. See also Ziegler, Katja S., (2011), 'International Law and EU Law: Between Asymmetric Constitutionalism and Fragmentation', in *Research Handbook on the Theory and History of International Law*, ed. Orakhelashvili, Alexander, Edward Elgar Publishing-Glos/UK, pp. 300. There are some doubts in applying direct effect of substantive obligations under the WTO agreement. In the frame of ECJ judgment in FIAMM case, transferability of the reasons such as reciprocity, flexibility and political negotiation, are the main reason of the lack of direct effect. In this sense, the EU negotiation power could not be impaired.

[582]See Case 70/87, *Fédération de l´industrie de l´huilerie de la CEE (Fediol) v Commission of the European Communities*, 1989 E.C.R. 1781, (1991) 2 CMLR 489.

of a Member state when a domestic system allows such direct effect.[583] A notable opinion of Advocate General Saggio in the *Portugal v. Council case* also mentioned that there was no obstacle for the ECJ to review secondary EU law in the light of WTO law.[584]Thus, the reason why direct effect method should be placed as prominent reason to deal with individual's right to compensation, because the ECJ requires this method as a main link on the implementation of WTO law.

In the FIAMM case, the GC emphasized that first, private plaintiffs must be able to point out an alleged violation of law to the GC by invoking WTO law to begin with. The Court often referred as "relying on" the law. And the second is that WTO law, appropriately invoked before GC, must validly serve as a basis for invalidating EU law or actions.[585] However, before to assess the second requirement, the method of "direct effect"[586] must be fulfilled before invalidity of the act of the institution can be relied upon a national court. That means the provision of WTO law must be capable of conferring rights on citizens of the EU which they can invoke before the Courts.[587] Nevertheless, the ECJ has been focused on discerning the spirit and general scheme of the international law obligation by the WTO, so the ECJ has paid little attention to the issue that the provisions are sufficiently clear and unconditional. The ECJ therefore could find that the WTO provision do not have direct effect because lack of being sufficiently clear and unconditional.[588]The ECJ definitely close the door for the implementation of concept direct effect in the FIAMM case, since the WTO, like its

[583]See Joined Cases C-300/98, *Parfums Christian Dior SA v. Tuk Consultancy BV* and C-392/98, *AsscoGerüste GmbH, Rob van Dijk v. Wilhelm Layher GmbH & Co KG, Layher BV*, (2000) ECR I-11307. The ECJ held that "in a field in respect of which the Community has not yet legislated, the protection of intellectual property do not fall within the EC Competence, but within the competence of the Member States. Thus the Community law neither requires nor forbids that the legal order of a member states should accord to individuals right to rely directly on the rule laid down by Article 50(6) TRIPS before the Courts."

[584]See Portugal Case, *Supra Note* 469, para 47.

[585]Errico, John, (2011), 'The WTO in the EU: Unwinding The Knot', *Cornell International Law Journal*, Vol. 44, Issue 1, pp. 179-191.

[586]See Case 26/62, *NV Algemene Transp. v. Netherland Inland Revenue Administrative*, 1963 E.C.R. 1. The idea of direct effect first crystallized in the Van Gend en Loos case. In this case, the plaintiff hoped that an individual could rely on a provision of the EU Treaty as international law in the court of a national member state to invalidate the actions of another member state.

[587]Joined Cases C-21/72 & C-24/74, *International Fruit Company NV v. ProduktschapvoorGroenten en Fruit* 1972 E.C.R. I-1219 [hereinafter International Fruit], before EU acts can be determined to be illegal on the basis international WTO law, its provision must also be capable of conferring rights on citizen of the Community.

[588]Errico, *Supra Note* 585, pp. 186.

predecessors the GATT, is still to be based on the principles of reciprocity and concessions. The ECJ also noted that the WTO Agreements are not of such a nature that they can be relied on directly before national or EU Courts.[589] Furtherance, giving direct effect for the WTO Agreements and DSB recommendations would have the consequences of depriving the legislative or executive organs of the contracting parties of the possibility afforded by Article 22 of the DSU for reaching a negotiated settlement even on a temporary basis.[590]

AG Maduro in his opinion regarding of this case mentioned that In term of the ability of ECJ to rely on international agreements, he refers to Article 300 (7) TEC (Article 218 TFEU) that "international agreement duly concluded by the EU with third countries or international organizations are binding on the institutions of the EU and on Member States".[591] This wording is both a reminder of an agreement's compulsory nature under international law and a statement of the binding force of these agreements includes WTO Agreements, under the EU law.[592] It therefore concludes that external agreements which are concluded in accordance with EU law and which therefore have binding effect on the EU constitute a source of EU legality.[593] The Court has expressly deduced from this that they have primacy over secondary EU legislation and in principle has jurisdiction to determine questions as to the validity of a EU act in light on an external agreement by which EU are bound.[594] The fact that WTO law cannot be relied upon before a court does not mean that it does not form part of EU legal system. Hence, this case-law must be understood not as

[589]Joined Cases FIAMM and Fedon, *Supra Note* 9.

[590]Bronckers, Marco, (2008), 'From 'Direct Effect' to 'Muted Dialogue', Recent Developments in the European Courts' Case Law on the WTO and Beyond', *Journal of International Economic Law*, Vol. 11, No. 4, December, 2008, pp. 885-898.

[591]Opinion AG Maduro, *Supra Note* 509, para. 23.

[592]See Case 181/73 *Haegeman* [1974] ECR 449, paragraph 5; Case 12/86 *Demirel* [1987] ECR 3719, paragraph 7; Opinion 1/91 [1991] ECR I-6079, paragraph 37; and Case C-162/96 *Racke* [1998] ECR I-3655, paragraph 41. With regard to the WTO agreements, see in particular Case C-344/04 *International Air Transport Association and Others* [2006] ECR I-403, paragraph 36; Case C-459/03*Commission* v *Ireland* [2006] ECR I-4635, paragraph 82; and Case C-431/05 *Merck Genéricos – ProdutosFarmacêuticos* [2007] ECR I-7001, paragraph 31.

[593]See Case 30/88 *Greece* v *Commission* [1989] ECR 3711, paragraph 13; Case C-192/89 *Sevince* [1990] ECR I-3461, paragraph 9; and Case C-188/91 *Deutsche Shell* [1993] ECR I-363 paragraph 17

[594]See Joined Cases 21/72 to 24/72 *International Fruit Company and Others* [1972] ECR 1219, paragraphs 6 and 7.

denying that the WTO rules are a source of EU law but as affecting their significance before a court.[595]

AG Maduro perceives that the possibility of relying on the WTO agreements as a whole has been categorically refused in principle, however, there still can be a room for application of the WTO rules by the courts only in so far as that would not affect the scope for negotiations for the WTO disputant parties, even in the event of the dispute itself. It is because political freedom to negotiate continues to exist if the reasonable period of time for implementation of the DSB Decision had not yet expired. But, FIAMM and Fedon have fair point in seeking compensation due to incompliance with the DSB Decision, since the reasonable period that the EU had been allowed to comply with the DSB Decision had expire on 1 January 1999. In a decision of 19 April 1999, the DSB had found that on 1 January the EU legislation continued to be incompatible with the rules of the WTO. Hence, since no satisfactory compensation had been agreed during the 20 days following the date of expiry of the reasonable period of time pursuant to Article 22 (2) of the DSU, the EU could no longer seek negotiated solutions. They had no choice but to comply with the DSB Decision. In conclusion, the acceptance of the possibility of reliance on the DSB Decision to obtain compensation for the damage caused by the retaliatory measures adopted as a result of the failure to implement the DSB Decision would no longer have any effect on the political freedom of the EU Institutions. Since the Fedon's claim for compensation was lodged after the WTO dispute had been settled, and FIAMM's was at least examined after it had been resolved.[596]

Although AG Maduro has explicitly gave reason to allow applicants to rely on DSB Decision in order to obtain compensation, the Courts insisted to deny direct effect of WTO obligations, because of ECJ may review the legality of EU measures in the light of the WTO law, if the EU has intended to implement a particular WTO obligations and where the EU measure refers expressly to the precise provisions of the WTO agreements. The ECJ also emphasized that recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the agreement concerned. Those provision (GATT) are not such as to create rights upon which individuals may rely directly before the courts by virtue of EU

[595]Opinion of AG Maduro, *Supra Note* 509, para. 37

[596]Ibid, para. 42-46

law.[597] But if there is a potential change regarding the impact of infringement of WTO Law by the EU could lead to the review of the legality of EU acts, it might be triggered because of the expiry of the implementation period of time granted by the DSB. It thus related to the seriousness of the infringement and the character of the infringed rule which however still denied by the courts in this case.[598]

Nevertheless, the analysis of this case will continue to stage where the applicants claim that there is absence of unlawful act conducted by the EU Institution in order to obtain compensation pursuant to EU liability principle.

3.2. The Absence of Unlawfulness Act Conducted by EU Institution

The Court's case law is enshrining in accordance with the second paragraph of Article 288 TEC (Article 340 TFEU) refers to the basis of the non-contractual liability of the EU for damage caused by its institutions or by its servants in the performance of their duties. It has held that the principle of the non-contractual liability expressly laid down in that article is simply an expression of the general principle familiar to the legal systems of the member states that an unlawful act or omission gives rise to an obligation to make good the damage caused. Referring to the *Brasserie case*, the requirement for non-contractual liability is that there must be a violation of EU law.[599] To this end, GC insisted in their judgments that there was not unlawful action conducted by the EU institution because the absence of direct effect pertinent to WTO obligations.[600] In addition, the continuation of Banana regime does not

[597] Joined Case FIAMM &Fedon, *Supra Note* 9, para. 105-134.

[598]Thies, *Supra Note* 444, (kindle) location 3475

[599]Holdgaard,Rass, (2008), *External Relations Law of the European Community: Legal Reasoning and Legal Discourse*, Kluwer Law International-The Hague/Netherland, pp.333. Holdgaard posited the Court opinion that the absence of violation of EU law correlated to the risks of international trading where the trader are involving to. The inherent risk is giving the effect that the very existence of possibility of retaliatory measures in the international trading system is excluding the right of individual to be compensated when Community acts have produced such retaliatory measures.

[600]In example, see case C-351/04 *IKEA v Commissioners of Customs & Excise* (2007) ECR I-7723, para. 55-56 (the judgment concerned average to average zeroing). The ECJ invalidated duty on bed linen, summarily finding that the EU institutions had committed a manifest error of assessment of EU law by having practiced 'zeroing' in calculating the dumping margin. For this case, the ECJ did not rely on the decision of WTO Appellate body. In conclusion, the ECJ explicitly declined to review the EU antidumping duty against the WTO Antidumping Agreement. See also Eckes, Christina, (2012), 'International Law as Law of the EU: The Role of European Court of Justice', in *International Law as Law of the European Union*, eds. Cannizzaro, Enzo, Palchetti, Paolo, and Wessel, Ramses A., MartinusNijhoff Publisher – Leiden/ Netherland, pp.366. Eckes argued that the appeals decision regarding the FIAMM case is interesting since the ECJ has different

constitute unlawful action conducted by the EU Institutions. These companies therefore referred to *Dorsch case* when the Court expounded that the liability for the absence of unlawfulness act should be under a precondition of the existence of 'unusual and special damage' and it would be necessary to 'prove that the alleged damage is real and a causal link exists.'[601] They refer to the GC's previous judgment that "When damage is caused by the conduct of the Community institution (EU) not shown to be unlawful, the Community (EU) can incur non contractual liability if the conditions as to sustaining actual damage, to the causal link between that damage and the conduct of the Community institution (EU) and to the unusual and special nature of the damage in question are all met."[602]Unfortunately the GC held that on the facts of the case, the conditions for the absence of unlawfulness act is not fulfilled; EU Institutions therefore were not liable to bear the compensation.

In the appeal proceedings, the ECJ reject the *Dorsch* approach since according to them after the development of *Schöppenstedt*test formula, liability can only be incurred for unlawful acts and, in case of discretionary acts of the EU legislatures. The ECJ in this case did not recognize that the conduct of EU institutions could be categorized as the absence of unlawful act that is triggering the right to compensation for FIAMM and Fedon Companies.[603]

However, in term to seek the comprehensive analysis whether in this case, the EU liability can be accomplished, it is necessary to evaluate detail reasoning provided by the GC and AG Maduro regarding the EU liability in the absence of unlawfulness act. The AG Maduro even emphasized that this case considers as 'no-fault liability'.

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point of views. The main point is the applicants did not have strong basis in regard with the lack of direct effect.

[601]Dorsch Consult Case *Supra Note* 441. See alsoBetlem, Gerrit, (2011), 'Francovich Liability for Breach of European Union', in *Theory of Practice of Harmonization*, eds. Andenas, Mads, and Andersen, Camilla Baasch, Edwar Elgar Publishing-Glos/UK., pp. 134. The Court declared that the liability for lawful conduct cannot deduce from previous case law, since unlike liability for unlawful acts, there is no firmly established regime for liability in the absence of unlawfulness at Community level.

[602]FIAMM Case *Supra Note* 478, para. 160.

[603]See Turk, Alexander H., (2009), *Judicial Review in EU Law*, Edwar Elgar Publishing-Glos/UK., pp.280-290. Turk argued that the ECJ Judgment did not consider the existence of liability regime incur within the sphere of EU Legislative competence, it leaves the possibility open that the EU liable under Article 340 TFEU for lawful administrative conduct.

1) the existence of actual and certain damage

In this case the applicants have shown the existence of actual damage where the damage is sufficiently certain and quantifiable.[604]The damage consisted as 96.5 per cent increase in the import duty levied by the U.S. The punitive tariff caused by the cost incurred in respect of setting up and the relocation of production units. It therefore because the loss of turnover resulting by the reconversion of the production units.[605]

2) the unusual and special nature of the damage suffered

The GC emphasized that damage suffered by FIAMM and Fedon Companies did not consider as 'a disproportionate and intolerable burden', because the damage stemmed from the realization of a risk that inherent in the economic activity affected to private economic actors.[606] The exclusion of liability in this context refer to the situation that those private economic actors should be aware of the risk of future regulations.[607] There are two conditions for the term of damage itself, first, the actual damage should be 'unusual' and 'special' that means a damage needs a comparison to other affected company and thereby incorporates elements of the German *Sonderopfertheorie*orprinciple *d'egalitédevant les charges publiques*.[608] Second, the judgment indicates that damage can be justified even if the measure pursues 'a general economic interest'.

In the appeal proceedings, the AG Maduro opined that the GC's decision should be annulled because of an error of law, since the GC had not properly assessed whether the damage was 'unusual' or 'special' in nature, taking into account the right to property of the applicants.[609] According to AG Maduro, the GC should have assessed the unusual nature of damage by looking closer at the economic risks inherent in the sector which the applicants operating. Damage could only be considered as normal if the realized risk has been inherent in the same market sector in which the applicants operated, and for which insurance could

[604]Toth, A.G., (1997), 'The Concepts of Damage and Causality as Elements of Non Contractual Liability' in *The Action for Damages in Community Law*, Eds. Heukels and McDonnel, Kluwer Law International – The Hague/Netherland, pp. 180-191

[605]FIAMM Case, Supra Note 478

[606] See Holdgaard, (2008), *Supra Note 599*, pp.333.

[607]Perkams, Markus,(2010), 'The Concept of Indirect Expropriation in Comparative Public Law – Searching for Light in the Dark', in *International Investment Law and Comparative Public law*, ed. Schill, Stephan W., Oxford University Press- Oxford/UK, pp.145

[608]See the case 59/83 *Biovilac v. EEC* [1984] ECR 4057

[609] Opinion AG Maduro Supra Note 509, para.83

have obtained. If there is no link between the EU conduct causing the damage and the economic sector in which the applicants operated, it thus the damage could not be considered the normal risk.[610]Thies argued that in order to identify risk of international trading, it is necessary to take account of the particularities of the legal situation of traders operating in a legal framework that is not only defined by the EU domestic legislation but also shaped by the WTO law.[611] The Court cannot deem that the company should be aware to the risk of future regulation, because the risk of future regulation is a foreseeable risk. Meanwhile, the WTO retaliation system pursuant to Article 22 DSU determines the discretion of other WTO Member to choose whether the imposition of suspension concession with respect to the same sector or other sector different with the sector to the dispute. Hence the private economic actors affected by the retaliatory measure cannot foresee the suspension concession. It also seems problematic to exclude in principle any right to compensation on the basis of 'foreseeability' if the EU conduct that triggers the imposition of retaliation is entirety unrelated to the sector in which these retaliation victims operate.

AG Maduro also consider that the damage needs to be special in nature in order to justify a right to compensation in a system of liability that is based on equal treatment with regard to the discharge of public cost or expenses.[612] According to EU Courts, damage is to be considered special 'when it affects a particular circle of economic operators in a disproportionate manner by comparison with other operators'.[613] However, the Court did not seek to compare with other operators who is also suffering from the retaliation, such as Pecorino Cheese and Cashmere Wool Companies, or other private economic actors who filed suit against EU Institutions, such as Beamglow, Carton druck, Le Laboratire du bain and others.[614] The Court can be easily defined by looking at the lists of product drawn by the USTR.[615] The product on the list can identify the private economic actors who are affected by the retaliation, and they are clearly distinct from all other economic actors in EU.

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[610] Ibid. Para. 82

[611]Thies, Supra Note 444, (kindle) Location 5248

[612] Opinion AG Maduro*Supra Note* 509 Para 77

[613] FIAMM Case *Supra Note* 478, Para. 202

[614]See case Beamglow*Supra Note* 481

[615]Federal Register, Vol. 64, No. 74, Monday, April 19, 1999, Notices.

3) the damage is not justified by a general economic interest

The EU Institutions demand the ECJ to consider the lack of a general economic interest as an additional condition for non-fault liability.[616] They concluded that compensation would be excluded if the EU act or conduct caused the damage was not adopted in order to favor particular interest but in the interest of society as a whole. Hence, according to ECJ, the exercise of legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the EU requires legislative measures to be adopted which may affect individual interest. Liability could only arise if the institution concern had manifestly and gravely disregard the limits on the exercise of its power. [617]

However, AG Maduro opined that the case only constitute as 'minority strand of case law', which would not justify the recognition of such an additional condition.[618] The recognition does not seem appropriate because 'equality in bearing public burdens and the protection to be accorded to the right to property demand that economic operators who suffered unusual and special damage be compensated, even if the measure that caused the damage was justify by the general economic interest'.[619] Furtherance, the analysis continues to the existence of infringement of general principle of law and fundamental right.

3.3. The existence of infringement of general principle of law and fundamental right

FIAMM and Fedon Companies invoked the right to property and the right to pursuit of an economic activity (freedom to trade and the right to choose and practice freely a trade or profession) which belong to the category of economic and property rights, the principle of sound administration and the principle of protection on legitimate expectation.

1) Property right and right to pursuit of an economic activity

FIAMM and Fedon claimed that the EU Institutions infringed their rights to property and to pursuit economic interest because they compelled to pay punitive tariff on their imports into the U.S. market. However, the ECJ concerned that in order to view that fundamental rights under EU law are not absolute, but it must be viewed in the relation to their social

[616]Joined Case 9/71 and 11/71, Compagnied'Approvisionnement v. Commission, (1972), ECR 00131, para. 45

[617]Joined Case FIAMM and Fedon, *Supra Note* 9, para. 174.

[618]Opinion AG Maduro, *Supra Note* 509, para 91-92

[619]Ibid

function.[620]. It refers to *Germany v. Council* Case, that such restriction in fact correspond to objectives of the general interest pursued by the EU and do not constitute in relation to the aim pursued a disproportionate and intolerable interference, impairing the vary substance of the right guaranteed.[621] Hence, according to the ECJ, the punitive tariff needs to be tolerated. FIAMM and Fedon would need to tolerate the impact of retaliatory measures imposed by the U.S. if the EU's upholding of a breach of WTO law

AG Maduro in this case underlined that the right to property and the right to pursuit of an economy activity justify the EU liability principle, according to which the EU legislation would not be able to interfere in individual property to an extent that comes close to an expropriation without compensation.[622] In order to justify the existence of infringement of property right, it is necessary to show that the damage caused by WTO retaliation is 'severe' in order to be considered as 'unusual' to fulfill the EU liability conditions, otherwise, the damage would not come close to an expropriation necessitating compensation on the basis of the right to property.[623] AG Maduro emphasized it is not necessary to show the damage is equivalent to a total and definitive privation of property, but it must have a sufficiently serious impact on the rights related to property. However, it is irrelevant whether the measure is lawful or unlawful since the liability in the absence of unlawfulness is not based on fault. [624] If thus the court should take into account the parameters such as the proportion of an economic actor's business affected by the retaliation.

In the framework of interpretation of Article 340 (2) TFEU, the court needs to consider 'the general principles common to the laws of the Member States', while in some EU Member States, such a liability principle has been based on the protection of the fundamental right of property. AG Maduro emphasized this by referring to German Law under *Sonderopfertheorie* (special sacrifice). This theory requires the state to grant compensation in the absence of unlawful state conduct, if the damage comes close to an expropriation.[625] This

[620]FIAMM &Fedon Joined Case, *Supra Note* 9, Para. 183

[621]Case C-280/93, *Germany v. Council*, (1994), ECR I-4973, para. 78

[622] Opinion AG Maduro,*Supra Note*509 Para 63

[623] Ibid, Para 76

[624]Uksagis, Erdem Buy and Van Boom, Willem H, *Supra Note* 321. No-fault liability (strict liability) principle is a limited liability application. It is based on notions of equality and solidarity. This principle requires special, abnormal or exceptional damage as a result of measures taken in the public interest which may recover compensation without the need to prove fault.

[625] Opinion AG Maduro, *Supra Note* 509, Para 63

theory basically is used by the GC in the *Dorsch Consult* case when the court explains in more detail what is meant by 'unusual damage'. This criterion requires a comparison to other affected party, and thereby incorporated elements of the German *Sonderoptheorie* if the damage closes to act of expropriation.[626]

2) Principle of sound and proper administration

According to FIAMM in GC proceedings, the EU did not bring its legislation into line with WTO rules even though it had assured its trading partners of its intention to comply with the ruling and recommendation of DSB, and it had obtained an exceptional extension of the period granted for the purpose. It is thus deemed as the infringement of the principle of proper administration. However, for this claim, the GC did not enter into detailed analyses concerning whether this principle is breached, since the absence of direct effect of WTO obligation will not trigger the infringement of sound and proper administration principle.

3) The principle of legitimate expectation

Legitimate expectation is the principle that its root lays in the concept of good faith, and the administration should not fail to keep promise that is caused to individual suffers loss. It emphasizes that when administrative decision is cancelled or revoked, the EU Institutions must concern regarding they act which influence individual rights or benefits in economic activity. They also must be able to respond to change underlying economic situation, when the economic actors do not have a vested right on the maintenance forever of the existing common organization of the market.[627]

Based on the principle legitimate expectation, FIAMM claimed that there had been the expectation that the EU would comply with its WTO law obligation and would not create a retaliation situation.[628] However, EU Courts denied this principle because the EU's assurance to comply with the WTO law given to its other WTO Member in the context of banana dispute would de facto make those political declarations enforceable within the EU legal order in the absence of a parallel requirement concerning such implication even though the EU Courts had denied the direct enforceability of underlying WTO primary law.[629]

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[626] See Dorsch Consult Case, *Supra Note*441, Para 80, See also opinion of Sir Gordon Slynn in Case *SA Biovilac NV v.s. European Econonomic Community*, *case 59/83*, judgment of the Court 6 December 1984, para 4091.

[627] Larragan, Javier De Cendra de, Supra Note 412

[628] FIAMM Case, *Supra Note* 478, Para. 93

[629]Thies, *Supra Note* 444, (kindle), Location 4593

Nevertheless, the general nature of protection on legitimate expectation principle is when EU Institutions have discretionary power to exercise the power in a particular way. This principle could give rise to an enforceable right on the part of the individual who held such an expectation that EU Institution will be required to give effect to it.[630] FIAMM and Fedon were in the presumption that based on *PactaSuntServanda* principle, EU Institution as a WTO Member, would comply with the DSB Decision and pursuant to Article 218 TFEU, and the EU Institution would comply with the international trade regulation. However, Thies argued that "It can hardly be expected that the EU Courts will recognize that the EU general commitments to the WTO Agreement or its specific assurances given in the context of international disputes to its international partners represent obligations that the EU acknowledge towards its own individual or traders. It thus seems unlikely that the Courts will acknowledge a right to compensation for retaliation victims merely based on expectations created by the EU's membership of WTO." [631]

FIAMM company also rely on the legitimate expectation of sustainable practice of 3,5% tariff upon battery products that has been negotiated between the EU and other WTO counterpart. The 3,5% tariff is minimum tariff for all battery product imported from EU that is justified by WTO harmonization tariff schedule. FIAMM is expecting that the EU Institution should sustain the level of tariff base on harmonization tariff schedule on battery product. Base on legitimate expectation principle, EU Institution is responsible to sustain the practice conferring to protect individual's right to trade. In this case, EU Institutions violate the legitimate expectation principle by not restraining the change of tariff that is diminishing the benefit of trade under the WTO Agreements. However, EU Courts did not make any consideration over this issue, since the EU Courts were reluctant to undertake legality review of EU measures against the benchmark of EU general principles and fundamental rights in FIAMM &Fedon Case, as it seems to have considered the direct effect of WTO law to be a precondition for the courts' overall review of EU conduct in the context of the WTO dispute on bananas.[632]

[630] Auburn, Jonathan, Moffet, Jonathan and Sharland, Andrew,*Supra Note* 413, pp. 20-24.

[631]Thies, *Supra Note* 444, (Kindle), Location 4730

[632] FIAMM Case, *Supra Note* 478, Para. 146

4. The Foreign Sales Corporation and Extraterritorial Income Exclusion (hereinafter FSC/ETI) Case (the EU v. the U.S.)

Another section of this chapter discusses the implications of WTO retaliation for private economic actors in the U.S. The reason is not to compare but to seek to what extent the implications of WTO retaliation for private economic actors in the U.S. territory and how the U.S. government deals with this conundrum. The analysis begins with the famous FSC/ETI case between the EU and the U.S.

4.1. The General Overview of the FSC/ETI Case

In 1999, the EU challenged the FSC as a violation of the Uruguay Round Agreements on Subsidies and Countervailing Measures (SCM Agreement). The FSC is the kind of tax exemption and special administrative pricing imposed by the U.S. Government to the U.S. Companies outside the custom territory of the U.S. The FSC regulated several features. First, the tax exemption is imposed to limited income from exports. Second, the exemption method did not replace the U.S. system of worldwide taxation of its corporations with an allowable foreign tax credit. Third, the FSC required company to carry out its economic activities abroad such exports. Fourth, the FSC required an agency agreements with its U.S. parent companies or related subsidiaries pursuant to which the American corporations produced all the exported products in the U.S. Fifth, as a rule of origin in trade terms, there was no more 50% of the fair market value of the exported property could be attributable to articles imported into the U.S. in order to qualify the exemption. Sixth, special transfer pricing rules applied to transactions between an American parents company and its FSC to maximize export sales profits in the FSC.[633] The tax exemption imposed to foreign trading gross receipts which means the gross receipt of any FSC are generated by qualifying transactions. It generally involves the sale or lease of export property. It includes: property held for sale or lease, manufactured, produced, grown, or extracted in the U.S., by a person other than a FSC, sold leased, or rented for use, consumption, or disposition outside the U.S. with no more than 50% of its fair market value attributable to imports. According to the U.S. Internal Revenue Code[634], a portion of the "foreign trade income" is deemed to be "foreign source income not

[633] TITLE 26—INTERNAL REVENUE CODE, p.2015 – 2029, available at: (http://www.gpo.gov/fdsys/pkg/USCODE-2010-title26/pdf/USCODE-2010-title26-subtitleA-chap1-subchapN-partV.pdf.)Last visited 15 August 2012. See also McDaniel, Paul R., (2004), 'The David R. Tillinghast Lecture Trade Agreements and Income Taxation: Interactions, Conflicts, and Resolutions',*Trade Law Review*, Vol. 57, Winter 2004, pp. 279-280.

[634] *Ibid*, historically, in 1971, Congress passed Section 991 through 997 of the Internal Revenue Code that granted special tax benefits to Domestic International Sales Corporations (DISCs). The Internal Revenue

effectively connected with a trade or business in the U.S." and it is therefore deemed as untaxed. This untaxed portion is referred as the "exempt foreign trade income". The remaining portion is taxable to the FSC. Dividends paid by the FSC out of exempt and non-exempt income to the shareholders or "related supplier".[635]Khachaturian gave an example for this foreign tax system, "if an American company sells a computer made in California to a buyer in France, the American firm must sell that computer to its FSC located offshore. This Company, in turn, sells the item to the ultimate buyer. The FSC then gain a tax exemption on 15/23 of its profit from that sale. In the calculation, if an American company produces a computer for US$ 1,500 in the U.S. and sells it to France for US$ 2,000, if the American company sells it directly, it is taxed at the full corporate tax rate of 35%. Alternatively, if the company producer ships the transaction through a FSC subsidiary, then it significantly reduces its taxes. The FSC can purchase the computer for US$1,885 and sells it to France for US$2,000. The FSC's profit of US$115 is shielded from corporate income tax. The American exporter is then required to pay taxes on only US$385 of its export profits".[636]

The FSC also implied special rule for agricultural cooperatives. All of the foreign trade income that a FSC owned by a related qualified cooperative earns from the sale of agricultural or horticultural products will be treated as exempt foreign trade income. In addition, the FSC also implied special administrative pricing sum up 23% of the total combined taxable income which derives from the sale of export property. Another administrative pricing rule was the FSC allowed to take 1.83% of the total foreign trading gross receipts from the sale of export property as foreign trade income which was not exceed twice the amount allocable to the FSC under the combined taxable income method.

At last, a FSC must either itself perform or pay for specific economic processes related to the relevant export transaction. By statute, in order to qualify for the partial tax exemption, a FSC that uses administrative pricing rules must perform, contract, or pay for all of the

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Services taxed DISCs on earnings distributed only to shareholders. The IRS allowed DISCs to defer taxes on roughly 50% of the shareholders income, by not taxing them on worldwide income. *See also*Khachaturian,Alex,(2008), 'Reforming the United States Export Tax Policy: An Alternative to the American Trade War with The European Union', *U.C. Davis Journal of International Law and Policy*, spring 2008, pp. 191. Khachaturian mentioned "three years later, the U.S. established the concept of Foreign Sales Corporations (FSC). It is an offshore, wholly-owned subsidiary of a U.S. Corporations. A portion of FSC is exempt from taxation. This is done by routing the sale of an item from its American source to an offshore production site and, ultimately to its final destination: the foreign consumer".

[635]*The United States-Tax Treatment For "Foreign Sales Corporations"*, Report of The Panel, *WT/DS108/R*, 8 October 1999, para. 2.1-2.5. (hereinafter FSC/ETI Case)

[636]Khachaturian, *Supra Note* 634, pp.191. See also Desai, Mihir A, Hines, James R., (2000), 'The Uneasy Marriage of Export Incentives and the Income Tax', *Michigan School of Business Office of Tax Policy Research*, (Working Paper No.12).

distribution activities attributable to the export transaction, which performed outside the U.S. territory, such as solicitation, negotiation, or making contract of the relevant FSC export transaction. The FSC must take responsibility for all the distributive activities, such as advertising and sales promotion, processing of costumer orders and arranging for delivery, transportation of goods involved in the transaction to the customer, determination and transmittal of final invoice of statement of account, and receipt of payment, and assumption of credit risk.

4.2. Panel and Appellate Bodies Findings

On 9 November 1998, the DSB established the Panel to assess the claim of the EU regarding of the action of the U.S. that violated Article XIII: 1 of GATT 1994 and Article 4 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) with respect to the Section 921-927 of the Internal Revenue Code (FSC treatment). The EU claimed that the U.S. has maintained the tax exemptions and special administrative pricing rules was violating Article 3.1 (a) of the SCM Agreement by granting subsidies contingent in law upon export performance. Article 3.1 (b) of the same Agreement by granting subsidies contingent in law upon the use of domestic over imported goods, and Article 3 and 8 read in conjunction with Articles 9.1(d), 10.1 and 10.3 of Agreement on Agriculture by granting export subsidies to agricultural goods in excess of its reduction commitments under that Agreement. The EU considered that it was nullification and impairment benefits in respect to violation of those agreements. The EU claimed that the FSC scheme involves two subsidies, first the certain exemptions from income taxes for FSCs and their parent companies provided by the FSC scheme identified as subsidy. It violated of Article 1 and 3 para.1(a) of the SCM Agreement.Second, the administrative pricing rules which it considers derogate from normal transfer pricing rules and to increase the amount of income shielded from taxation by the FSC exemption. It violated Article 1.1 (a) (1) (ii) SCM Agreement. Finally the EU considers that the subsidies by the FSC scheme fall within the scope of item (e) footnote 59 of the Illustrative List of Export Subsidies prohibited by Article 3.1. (a) SCM Agreement.[637]

[637]FSC/ETI Case, *Supra Note* 635, para. 7.35. Annex I: Illustrative List of Export Subsidies SCM Agreement point (e): "the full or partial exemption, remission or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises." Footnote 59: "the Members recognize that deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected. The Members reaffirm the principle that prices charged for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be prices which would be charged between independent enterprises acting at arm's length. Paragraph (e) is not intended to limit a Member from taking measures to avoid the double taxation of foreign source income earned by it enterprises or the enterprises of another Member."

On the other hand, the U.S. contended that the FSC scheme does not confer any export subsidy. According to the U.S, the footnote 59 indicates that income generated from foreign economic process need not be taxed. The exemption of some or all of such income, by whatever means, is not a prohibited export subsidy. Referring to a 1981 decision and understanding of the GATT 1947 Council established that the exemption from tax of income attributable to foreign economic process does not constitute the foregoing of revenue that is otherwise due within the meaning of Article 1.1 (a)(1)(ii) of the SCM Agreement. The exempting income from foreign economic process is not considered to be contingent upon export performance. The U.S. viewed that footnote 59 allows Members to use administrative or other practices to distinguish income derived from economic processes outside their territory, as long as the overall allocation of income approximates arm's length results and does not result in a "significant saving" of direct taxes in export transactions. Consequently, the FSC scheme does not confer any export subsidy within the meaning of Article 3.1(a) of the SCM Agreement.[638]

To this claim and contra claim both by the EU and the U.S., the Panel come to the conclusion in three points of view. The first, in regard with claims under Article 3.1(b) of the SCM Agreement, Panel found that exemptions under the FSC scheme are prohibited export subsidies, because, first, the revenue is foregone according to Article 1 of the SCM Agreement and, second, the exports are taxed more favorably than production abroad. The Panel also decided that footnote 59 of the SCM Agreement does not permit a territorial exemption applied solely to export earnings.[639]The second, in regard with Article 3.3 of the Agreement on Agriculture (consequently with its obligations under Article 8 of the Agreement), Panel found that the U.S. has acted inconsistently with its obligations under this agreement, by providing export subsidies listed in Article 9.1(d) of the Agreement on Agriculture in excess of the quantity commitment levels specified in the U.S. Schedule in respect of wheat. The U.S. also violated Article 9.1(d) of the Agreement on Agriculture in respect of all unscheduled products by providing export subsidies. In terms of 1980 decision and understanding of GATT, the Panel declared that the 1980 Council Decision is not "a legal instrument" of the GATT-1947. Although the Council Decision was reached affirmative negotiation than any other Council Decision in GATT history, it did not consider as a legal

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[638]*Ibid*, para. 7.36.

[639]*Ibid*, para.7.113-7.117

instrument that the U.S. could rely on to this case. In addition, the Panel concluded that the 1980 Decision had not been adopted in the GATT 1994.[640]

On October-December 1999, the U.S. and the EU appealed certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the previous proceedings. In their appeals, both parties argued about some issues regarding the FSC treatment. For this appeal, Appellate Body come to the conclusion that first, the FSC measure constitutes a prohibited export subsidy under Article 3.1(a) of the SCM Agreement. Second, the U.S. proved act inconsistently with its obligations under Article 10.1 and 8 of the Agreement on Agriculture by applying export subsidies, through the FSC measures. The measure leads to circumvention of its export subsidy commitments with respect to both scheduled and unscheduled agricultural products. Third, the Appellate Body also decline to examine Panel interpretation as requested by both party in respect to Article 3.3 Agreement of Agriculture. The Appellate Body as well declined to examine Panel's denial that the EU claim the FSC administrative pricing rules pending recourse by the EU to the facilities of an appropriate tax forum.[641] Finally, the Appellate Body ruled that the U.S. should apply the tax system in a way that is consistent with its WTO obligations. According to Appellate Body, "whatever kind of tax system a Member chooses, that Member will not be in compliance with its WTO obligations if it provides, through its tax system, subsidies contingent upon export performance that are not permitted under the covered agreements."[642]

4.3. Arbitration Findings

In order to comply with the Panel and Appellate Body decisions and DSB recommendations, the U.S. promulgated the Extraterritorial Income Exclusion Acts (hereinafter ETI) on 15 November 2000.[643]ETI was considered as the newest American taxation scheme. It replaced all FSC legislation, and it is also defined as "the gross income of

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[640]*Ibid*

[641] The *United States – Tax Treatment for "Foreign Sales Corporations*", *WT/DS108/AB/R*, 24 February 2000, para. 177-178. (FSC/ETI Case Arbitration)

[642]*Ibid*, para. 179-180

[643]Hufbauer, Gary Clyde, (2002), 'The Foreign Sales Corporation Drama: Reaching the Last Act*?'International Economic Policy Briefs*, No. PB02-10, November 2002, pp. 6. The ETI Act is excluding from the U.S. definition of gross income certain foreign source income or "a portion of export earnings, and a portion of earning from production abroad. In other word, the U.S. adopted a partial territorial system, providing some relief from double taxation both for exports and foreign production. However, corporate tax payers could only use the territorial method by renouncing their tax credit with respect to the same earnings. The benefits of the ETI Act were conditioned on the use of less than 50% foreign inputs of goods and services.

taxpayer attributable to foreign trading gross receipts".[644]ETI also adopted the principle feature that it is an exclusionary of taxation method, and not a deferral taxation method like FSC.[645]By making ETI, a taxation exclusion method to make sure that it was not export contingent. Congress created ETI in order to be fully compliant with the WTO decision on FSC's. It has been stated by one of the U.S. official, "our proposal directly addresses the WTO Panel decision and it is both in fact and in law of WTO compatible."[646]

However, the EU considered that the ETI Act still did not comply with the recommendations and rulings of the DSB and it was not consistent with the U.S. obligations under the SCM Agreement, the Agreement on Agriculture and the GATT 1994. The EU therefore requested to refer the matter to the original Panelist accordance with Article 21.5 of the DSU (compliance Panel). However, similar to Panel decision in the first report for FSC case, the Panel decided that the ETI Act also involved subsidies related to export performance, thus it is inconsistent with Article 3.1 (a) of the SCM Agreement. It also fails to fall within the scope of footnote 59 of the same agreement because it is not a measure to avoid the double taxation of foreign-source income within the meaning of the footnote. The U.S. also has acted inconsistently with its obligation under Article 3.2. of the SCM Agreement not to maintain subsidies referred to in paragraph 1 of Article 3 of the SCM Agreement. The ETI Act involves export subsidies as defined in Article 1(e) of the Agreement on Agriculture, accordingly, the U.S. is in this regard applying the export subsidies with respect to both scheduled and unscheduled agricultural product, in the way threatens to circumvent its export subsidies under Article 3.3. of the Agreement on Agriculture, and violating Article 10 (1) and 8 of the same agreement. In terms of GATT 1994, the ETI Acts is considered inconsistent with Article 4 by reason of the foreign articles/labor limitation as it accords less favorable treatment within the meaning of that provision to imported products than to like products of U.S. origin. The last, the U.S. basically has not fully withdrawn the FSC subsidies found to be prohibited export subsidies inconsistent with Article 3.1(a) of the SCM Agreement and it

[644]*Ibid*.

[645]Lopez-Mata,Rosendo, (2001), 'Income Taxation, International Competitiveness and the World Trade Organization's Rules on Subsidies: Lessons to the U.S. and the World from the FSC Dispute', *Tax Law Review* No. 54, pp. 604. ETI adopted two characteristic of income to be excluded, first, qualifying foreign trade income means the amount of gross income which, if excluded, will result in a reduction of the taxable income of the taxpayer from such transaction equal to 30% of foreign sale and leasing income or 50% of foreign trade income. Second is non- qualifying foreign trade income is not excludable from gross income.

[646] See Murphy, Sean D., (2000), 'Contemporary Practice of the United States Relating to International Economic Law, US position of Foreign Sales Corporation', America Journal of International Law No. 94, pp. 533.

has therefore failed to implement the recommendations and rulings of the DSB made pursuant to Article 4.7 SCM Agreement.

Furtherance the Panel decision has been strengthens by the Appellate Body decision. The Appellate Body upheld all Panel decisions, included the interpretations of Article 10.3 of the DSU regarding the third party. The EU requested Appellate Body to reverse the Panel's finding that third parties are not entitled to receive all of the parties' written submissions to the meeting of the Panel, only for the first written submissions. On the contrary, the Appellate Body finds that the Panel erred in its interpretation of Article 10.3 of the DSU to rule that all written submission of the parties filed prior to the only meeting of the Panel must be provided to the third parties. Finally, the Appellate Body recommends the DSB to request the U.S. to bring the ETI measure that found in the Panel Report, to be consistent with its obligations under SCM Agreement, Agreement on Agriculture and GATT 1994. The DSB afterward requested the U.S. to implement fully of the recommendations and rulings of the DSB in the FSC Case.[647]

Unfortunately, the EU concerned that the U.S. did not comply with the DSB recommendations regarding ETI Act, thus on 17 November 2000, the EU requested DSB to establish Arbitration under Article 21.5 of DSU, considering that the U.S. fails to withdraw the subsidies as required by Article 4.7 of the SCM Agreement.[648]The DSB then established Arbitration to assess the argument of both parties, and to calculate the amount of nullification and impairment caused by subsidies that the U.S. has conducted. According to Arbitration, the amount of countermeasures that proposed by the EU is appropriate. The amount of US$4,043 million, which falls within the range of reasonable values calculated on the basis of the parties methodologies can be considered to be a reasonable approximation of the actual value of the subsidy for the year 2000.[649]

On August 2002, the Arbitrator determined that the EU could impose tariffs on US$ 4,043 million to the U.S. exports. The EU officials indicated that they would not apply the

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[647]*The United States – Tax Treatment for "Foreign Sales Corporations", Recourse to Article 21.5 of the DSU by the European Communities*, *WT/DS108/AB/RW*, 14 January 2002, para. 4 and 256.

[648] The EU noted that the time period within which the U.S. was to have withdrawn the prohibited FSC subsidy in this dispute originally terminated on 1 October 2000. After the U.S. asked the DSB to modify the time period, the termination would be 1 November 2000, however on 15 November 2000, the U.S. was still enacted the ETI Act. See *WT/DS108/AB/RW, Ibid*

[649]*The United States – Tax Treatment For "Foreign Sales Corporations" , Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, Decision of the Arbitrator, *WT/DS108/ARB*, 30 August 2002, para. A 34.

tariff s as long as the U.S. was making progress towards WTO compliance. However, on May 2003, the EU officials stated that they would begin imposing tariffs by January 2004. In November 2003, again the EU officials delayed the imposition of the retaliatory tariffs until March 2004. It provided time for the Congress of the U.S. passed legislation to bring the U.S. into compliance with its WTO obligations. [650]

On September 2002, the EU Officials published a list of product that could be subject to retaliation. These products were selected from the very general custom chapters which have been notified to the WTO at the time of the original condemnation of the FSC by the WTO Adjudication Body. The EU decided to impose the escalating tariff beginning at 5% and culminating at 17% a year later to indicate restraint.[651]

Below is the FSC/ETI Retaliation List of Products:[652]

Sector Harmonized System, 2 digit level	Percent of Total US Exports to EU 2002	Estimated Value Targeted (Euros in millions)	Percent of Total Targeted
Precious Stones and Jewelry	2.1	1,431	36.0
Machinery and Mechanical Appliances	22.5	627	15.6
Wood and Paper Articles	2.1	300	7.5
Leather Articles Thereof	0.1	289	7.2
Toys, Games, Sports Equipment	0.6	181	4.5
Copper and Aluminum Articles	0.4	181	4.5
Electrical Machines	11.8	146	3.6
Cotton, Textiles and Footwear	0.4	139	3.4
Vegetables, Fruits, Grains and Oils	2.2	138	3.4

[650] Ahearn, Raymond J., *European Trade Retaliation: The FSC-ETI Case*, in CRS Report for Congress, RS21742, 11 February 2005, pp.3

[651] *Ibid*, the EU applied countermeasures on the selected products consist of an additional customs duty of 5% to be enforced as from 1 March 2004, followed by automatic monthly increases by 1% up to a ceiling of 17% to be reached on March 2005, if compliance has not happened in between. The EU has estimated the amount of the countermeasures at $315 million in additional customs duties in the period 1 March to 31 December 2004 and at US$666 million in additional customs duties for the period 1 January 2005 – 31 December 2005. These amounts have been estimated by applying the above mentioned extra customs duties on the average imports during the period of 1999-2001.

[652] *Ibid*.

Iron and Steel	0.8	131	3.2
Certain Prepared Foods and Food Residues	1.3	123	3.0
Ceramic Glass Products	0.5	113	2.8
Meat and Dairy	0.2	72	1.8
Prepared Foods and Sugar	0.1	71	1.7
Tools, Implements	0.6	88	2.2

The U.S. considered that the retaliation affected a numbers of the U.S. Companies and workers, furtherance they have complained bitterly to their representatives.

5. The Implication of the FSC/ETI Retaliation to the U.S Trade policy

Unlike the Banana Case, when several EU Companies recourse to seek compensation caused by WTO retaliation to the EU adjudication bodies, the U.S. Companies would not seek compensation through the adjudication body, instead they persuaded their political representatives to comply with the DSB ruling and recommendation. This is because the U.S. explicitly does not recognize direct effect of WTO Agreements in to domestic law. [653]

Section 201 of the UURA regulates explicitly non direct effect of WTO obligation, accordingly, when the EU planned to impose retaliatory tariff, the companies in this regard realize that there will be no recourse before the court to seek compensation[654]; instead they relied on consultations with relevant the U.S. Congressional committees and Senate. In early 2003, eighty business and trade associations around the U.S. filed petition to their representative both to the Congress and Senate, due to the proposal of retaliatory tariff

[653]See Chapter III

[654]See Garten, Jeffrey E., (1995), 'American Trade Law in Changing World Economy', *International Lawyer Journal* No. 29, pp.30.Garten mentioned that "The UURA refers to the notion of the U.S. in regard with the implementation of GATT that the U.S. will not permit the GATT to provide a remedy to private parties and become a substitute for domestic courts. The implementation of legislation will therefore provide that, if the U.S. government accepts the panel decision, they will implement it in a prospective manner, as has been our consistent practice, through changes to U.S. law if necessary. "On the other hand private party can sue against federal agency in regard with violation of WTO obligation. See case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 1984.*Pursuant to Section 102 (c) of URAA that is prohibiting private parties from challenging governmental action on the basis that it violates a WTO Agreement, it does not preclude the U.S. Court's consideration of an Appellate Body's decision. In this case, the court explained that a foreign manufacturer bringing an Appellate Body decision to the Court's attention is not bringing an action under any WTO Agreement. Rather, the court stated, the manufacturer is arguing that the federal agency's application and interpretation of U.S. law violates its international obligations pursuant to a WTO Agreement.

imposed by the EU. In this petition, those companies refer to the future loss of benefit they would have if the U.S. Government remained silent to this retaliation. For example, the letter of petition from the Manufacturing Jewelry, Jewelers and Suppliers of American Association mentioned because the EU's retaliatory tariffs cover several U.S. industries includes jewelry industry. This industry was targeted with 30% of the tariffs. Although the tariff began at level of 5% from March 2004, the EU increased 1% every month until a ceiling of 17% reached on March 2005. The jewelry industry could pay up to US$ 1.43 billion of the US$ 4 billion retaliation.[655] Another targeted high tariff was paper industry. The Paper industry likely had the same problem with the jewelry industry, although the estimated value targeted reached US$ 300 million in a year. This punitive tariff will be imposed on 165 paper and pulp items around the U.S. territory, which gave much burden for those affected companies.[656]Those business associations submitted two issues: the first, Congress must repeal the ETI provisions in order to comply with WTO decisions and rulings, and the second, on the other hand, due to the possibility of lost job in some companies that is also facing the gradual high tariff imposed by the EU, the Congress must find a way to bring American jobs back into the U.S., in calculation, the Congress must find ways to bring back US$ 300 billion in American jobs.[657]

It was not only big multinational company who complained through their representatives regarding the future impact of retaliatory tariff, but also most of American small business owners who would be more devastating.[658] Thus, in 2003, various proposals were introduced in the House and Senate Committee to repeal the ETI Act. Congress believed the repeal could return approximately US$50 billion to the U.S. treasury over the next ten

[655]Heebner, Jennifer, (2005), 'Change Afoot for U.S. Jewelry Manufacturers', JCK Magazine, 5 January, available at: (http://www.jckonline.com/article/292290-Change_Afoot_for_U_S_Jewelry_Manufacturers.php,) last visit 15 November 2012.

[656]Ince, Peter J., Akim, Eduard, Lombard, Bernard, andParik,Tomas, (2004), *Chapter 8: Consumption Climbs in Central and Eastern Countries, Stagnates in the West: Markets for Paper, Paperboard and Woodpulp 2003-2004*, UNECE/FAO Forest Products Annual Market Review, 2003-2004, pp. 59-60.

[657]Byrd, Kristin, (2005), 'Can We Provide A Level Playing Field for U.S. Corporations and Increase U.S. Jobs While Repealing the Extraterritorial Income Act?',*Houston Business and Tax Law Journal*, Vol. V, pp. 339-365. Congress need to create an indirect value added tax, similar to the European System, increase incentives for research and development, reduce the effective corporate tax rate of 32%, provide provisions for the repatriation of income for companies that continue to keep money overseas and make available certain tax incentives for companies that maintain/jobs within the continental U.S. and phase out the incentives as the companies move facilities across international borders.

[658]Resource from Hearing of Committee on Small Business House of Representative, 108 Congress, The WTO's Challenge to FSC/ETI Rules and Effect on America's Small Business Owners, Serial No. 108 – 114. Washington DC, May 14, 2003, p.2-3.

years, it also could increase the competitive position of the U.S. companies in conducting international trade and to retain jobs within the U.S. and in the end, it could be possibly to restrain the severe impact of the EU retaliatory tariff. There are three proposals created by House of Representative and Senate, namely, The Job Protection Act of 2003, (H.R. 1769), American Jobs Creation Act of 2003 (H.R. 2896), and Jumpstart Our Business Strength (JOBS) Act 2003 (S. 1637). These three bills are accommodating both the interestsof American private economic actors in achieving international trade benefit and restrain the EU tariff retaliation.

1) The Job Protection Act of 2003, (H.R. 1769)[659]

On April 2003, the Committee on Small Business House of Representative created a bill of Job Protection Act of 2003. The bill is purposed to amend the Internal Revenue Code to repeal the FSC/ETI exclusion, with an exemption for certain binding contracts in effect before the date of enactment of this Act. The Act permits a foreign corporation that elected to be treated as a domestic corporation to revoke such election and be treated as a domestic corporation transferring its property to a foreign corporation with no gain recognized on such transfer. It also provides: 1) a transitional 2004 through 2008 sliding-scale deduction for an FSC/ETI beneficiary based on the corporation's 2001 FSC/ETI benefit; and 2) special rules for 2003 and for fiscal year taxpayers. The Act is allowing a deduction for income attributable to the U.S. production activities equal to 10% of qualified production activities. It provides a 2006 through 2009 phased-in period. The act defines "qualities production activities" as: 1) the portion of the modified taxable income attributable to domestic activities, and 2) the domestic/foreign fraction. At last, the Act set forth related provisions with respect to: 1) determination of income attributable to domestic production activities; 2) domestic production gross receipts; 3) qualifying production property; 4) domestic/foreign fraction and 5) special rules.[660]

[659]Bill Summary and Status 108 the Congress (2003-2004), H.R. 1769, Job Protection Act, The Library of Congress, available at (http://thomas.loc.gov/cgi-bin/bdquery/z?d108:H.R.1769). the Act is jointly sponsored by Congressmen Phil Crane (R-Illinois), Vice Chairman of the House Ways and Means Committee, Charles Rangel (D-New York), Ranking Member of the House Ways and Means Committee, and Don Manzullo (R-Illinois), Chairman of the House Committee on Small Business.

[660]Ibid, summary.

2) American Jobs Creation Act of 2003 (H.R. 2896)[661]

On October 28, 2003, the House Ways and Means Committee passed the Thomas bill 24-15. The purpose of the bill is to provide US$140 billion of tax relief over ten years. However, the net cost of the proposed mark is US$60 billion over ten years. Over two-thirds of the tax relief goes to domestic manufacturers. Less than one-third of the tax relief goes towards international tax relief for multinational companies even though they currently received over 90% of FSC-ETI benefits and employ over 50% of the U.S. manufacturing workforce. In summary, the bill provides a provision that is allocating US$ 40 billion of the US$50 billion from the repeal of the ETI Act, toward a 3% income tax rate cut to manufactures. The tax rate cut applies to property that is manufactured, produced, grown or extracted, including tangible personal property, agriculture, softwood timber, processed food, construction, architectural, and engineering services for construction projects built in the U.S., extracted items are software, movies, music and, oil and gas. The bill also provides new reduced 32% top corporate tax rate for all corporations with less than US$20 million of tax income. For small and medium enterprise, the section of 179 provision increase the amount of capital purchases from US$25,000 to US$100,000 and increase the size of companies eligible for the provision by doubling the capital expenditure cap from US$200,000 to US$400,000.[662]

In order to restrain the EU retaliatory tariff, the bill also provides a provision that is enable the U.S. companies to compete under rules similar to their foreign competitors. The bill modifies the current taxation of foreign sales and services income so that U.S. companies are not at a disadvantage in the marketplaces when competing against foreign companies in the EU. The provision allows U.S. companies to remove duplicative and uncompetitive structures and operate under rules similar to those enjoyed by EU companies. It specifically helps U.S. companies expand their manufacturing by lowering the costs of U.S. exports to Europe. The main reason for this provision is treating the EU as one country.[663] Although the EU lifted sanctions against the U.S few weeks after the Act is enacted, the EU still hesitates

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[661]Resource from Committee on Ways and Means, The American Jobs Creation Act of 2003, Summary of H.R. 2896 passed by the Committee, 28 October 2003. P. 1-5. Also Available at (http://thomas.loc.gov/cgi-bin/bdquery/z?d108:H.R.4520).The American Jobs Creation Act of 2003 (H.R. 2896), sponsored by Congressman Bill Thomas (R-California) and Chairman of the House Ways and Means Committee.

[662]*Ibid*

[663]*Ibid*, Besides the tax rate cut, the bill also provides Alternative Minimum Tax relief, Net Operating Loss relief, S-Corporation Reforms, and Repatriation Provisions

about the purpose of this bill in repealing the FSC/ETI Act. Furtherance, in 2005 the EU requested that the WTO convened a Panel in order to address the Act's phase-out of the ETI, and to examine whether it actually complied with the WTO. In 2006 the Panel findings upheld to appeal.[664]

3) Jumpstart Our Business Strength (JOBS) Act 2003 (S. 1637)[665]

The JOBS Act is a leading bill that was introduced by Senator Charles Grassley and Max Baucus in the Senate Finance Committee. The proposed bill remained revenue neutral and provided increased revenue to corporations, approximately US$ 56 billion, through a reduction of the corporate tax rate from 35% to 32%. The main purpose of the bill is the benefit from ETI Act will gradually decrease as for 2004-2005 it reduces to 80% and for 2006 only 60%. The proposal continued to provide over US$100 billion in business tax breaks over the next decade. The main of this bill is the U.S. might consider moving toward a territorial tax system as the Joint Committee on Taxation recommended. It would provide U.S. companies with the same benefits of European nations now receive.

As result of JOBS Act, the EU suspended retaliation effective January 1, 2005, but moved to challenge the legality of certain provision such as transitional arrangement for its abolition and the "grandfathering" benefits for U.S. corporations that had already signed contracts. In early 2006, the Appellate Body agreed with decision of the Panel that the U.S. repeal legislation fails to comply with its WTO obligations because of the grandfathering and two year transition period under which the FSC/ETI benefits should be phased out. On January 31, 2006, the EU adopted a new regulation providing for new retaliatory duties by May 2006, however, the countermeasures were never imposed due to the fact that Congress repealed the grandfathering FSC/ETI benefits providing in Tax Increase Prevention and

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[664]Request for the Establishment of a Panel, *United States — Tax Treatment for "Foreign Sales Corporation,"* WT/DS108/RW2 (Jan. 14, 2005).see also United States – Tax Treatment For "*Foreign Sales Corporations", Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW2, 13 February 2006. In In September 2005, the WTO Panel concluded, in paragraphs 7.65 and 8.1 of the panel report, mentions that " to the extent that the United States, by enacting Section 101 of the American Jobs Creation Act of 2004, maintains prohibited FSC and ETI subsidies through the transitional and grandfathering measures, it continue to fail to implement fully the operative DSB recommendations and rulings to withdraw the prohibited subsidies and to bring its measures into conformity with its obligations under relevant covered agreement.

[665]Bill Summary and Status 108th Congress (2003-2004), *the Jumpstart Our Business Strengths Act (S. 1637),* The Library of Congress, available at (http://thomas.loc.gov/cgi-bin/bdquery/z?d108:S1637), the Act is co-sponsored by Senator Chuck Grassley (R-Iowa), Chairman of the Senate Finance Committee and Senator and Max Baucus (D-Montana), Ranking Member of the Senate Finance Committee.

Reconciliation Act.[666]

The EU might not impose the retaliation; however, the implication of it was leading the U.S. Government to change their trade policy in to conformity with the WTO decision. The FSC/ETI Case is one of the cases that has involved challenges to trade policies or decisions of the U.S. Government. It has been shown that Congress made different approaches to comply with WTO regulations and in its final form, the Act has changed the Code, not only to avoid the sanction but also to safe the U.S. business from decreasing benefit in international trade relations.[667]The U.S. Legislative bodies (Congress and Senate) have made some efforts to restrain the damage of the EU retaliatory tariff by promulgating new Act. The reaction of both Congress and Senate is to repeal the Act that violates the WTO Agreement.

As mentioned in chapter III, the implementation of Uruguay Round in the U.S. demands highly political process instead of adjudicating process.[668] Private economic actors therefore can interfere in the process of implementing the WTO Law by influencing Congress as political and economic constituents. In this term, Congress increases involvement in foreign trade by its function derives from pressure of private economic actors. These private economic actors may exert their influence within the executive through the Congressional instrument of delegation. As a result of the division of powers between Congress and the executive in foreign trade, the Congress views individuals can control the executive in trade policy matters through the instrument of delegation, so the Congress establishes rights for individuals in the trade process in order to influence the final trade policy outcome.[669]

In the array of the U.S. legal system, the place of private economic actors can be deemed as individual who is holding right and obligation, their political right is more prominent by submitting petition to their representative body. As already noted in Chapter II, R. Ostrihansky posited "it is not government, but enterprises and individual who make most

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[666]See Commission of the EU, Proposal for a Council Regulation, *Amending and Suspending the Application of Regulation (EC) No 2193/2003 establishing additional customs duties on imports of certain products originating in the United States of America*, Brussels, 22.12.2004, COM(2004) 822 final 2004/0282 (ACC). Available at: (http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0822:FIN:EN:PDF)

[667]Organek, Robin, (2008), 'Congressional Response To WTO Sanction: Turning Lemons into Lemonade in The American Jobs Creation Act of 2004', *University of Miami International and Comparative Law Review* Vol.16, pp.150

[668] Ibid, pp. 156

[669]Molyneux, Candido T.G., (2001), *Domestic Structure and International Trade: the Unfair Trade Instruments of the United States and the European Union*, Hart Publishing – Oxford/UK, pp. 65.

economic decisions."[670] From this argument, it is comprehensible if private economic actors are holding an important role in economic environment; moreover, these legal entities for some reasons are affecting government economic policy both at the level of national and international.[671]

The UURA basically does not totally close to possible leeway for private economic actors to complain before the court in the context of WTO obligation. The court in some cases recognizes that, at least under certain conditions, a WTO dispute settlement decision may be taken into account by a court in ruling on the correctness of federal agency's determination.[672]In the case of *Pam S.p.A v. U.S. Dept. of Commerce*, the court declared that the reasoning of decisions by WTO Panels and Appellate Body may help to inform the court's decision.[673]In other case such *Timken Co. v. U.S.* the court posited that an ambiguous statute should be interpreted to avoid conflict with international obligation.[674]The WTO Agreement would seem to be applicable as law, but only a single plaintiff, the U.S. Federal Government has standing to invoke them in the domestic court. But, in term of implication of WTO retaliation to private economic actors in the U.S., the rights of private economic actors due to the loss of trade benefit is not seeking compensation but more to political pressure to the Congress to comply with the WTO obligation, because the UURA recognize the preclusion of private remedy. This is based on that the force of the WTO rules within any member's domestic law depends on direct effect and supremacy, and the WTO supremacy is excluded an as option in the U.S.[675]When it comes to implication of WTO retaliation, the private economic actors need to refer to the system that is adopted by the U.S. legal system.

6. To What Extent State Liability is Accomplished?

The implication of WTO Retaliation (Banana and FSC/ETI case) is trade damage borne by private economic actors. However, when these private economic actors are seeking

[670]Ostrihansky, *Supra Note*168 ,p. 174-175.

[671] See MacDonald and Woolcock, *Supra Note* 166.

[672] See case SNR Roulements v. U.S., *Supra Note* 494.

[673] See Case *Pam S.p.A. v. U.S. Dept. of Commerce*, 265 F. Supp. 2d 1362, in 25 International Trade Review (BNA) 1577, 2003.

[674] See 'Timken Co. v. U.S. Case', 788 F. Supp. 1221, the U.S. Court of International Trade, 12 March 1992 in *International Trade Review*Vol. 26, pp. 1072.

[675]see Jackson, John H., (2000), *The Jurisprudence of GATT and the WTO: Insight on Treaty Law and Economic Relations*, Cambridge University Press-Cambridge/UK, pp. 328- 366

compensation caused by the retaliation, both EU and the U.S. restrains this possibility by invoking concept non-direct effect. John H Jackson mentioned that the lack of direct effect of WTO Agreements in domestic law is considered a possible protection against sovereignty diminution. He emphasized that " this is because without direct effect, a nation normally can decide how to respond to a complaint that its actions have breached international law, and one response possible is to ignore the complaint and live with the breach."[676] Sovereignty diminution in this context is that the WTO Member gives a part of their sovereignty in order to comply with WTO obligations.

From the EU experience, although Article 340 TFEU opens possibility for private economic actors to seek compensation due to the damage caused by EU Institutions in the performances of their duty, but when the damage occurs due to the infringement of WTO obligations, the EU Courts unequivocally declare in all settled case law, that "No liability regime exist under which the Community (EU) can incur liability for conduct falling within the sphere of its legislative competence in a situation where any failure of such conduct to comply with the WTO Agreements cannot be relied upon before the Community (EU) Courts."[677] It is because the EU Institutions have sole authority to deal with external relationship, includes trade relationship under WTO Law. The Court thus refrain from applying rules of internal law which are incompatible with the WTO Agreements that would have the consequence of depriving the function of legislative or executive organ to conduct their function in terms of WTO dispute. The Court's reasoning to deny the overall to invoke WTO Law and its breaches has been based primarily on the EU political interest to prevent consequences, which could place the EU Institutions in a disadvantages situation compared with other WTO Members.[678] Hence, this situation creates a dogma that political power over judicial repercussion refrain the function of state liability as a principle to protect individual rights.

It has been discussed in chapter III that the perception of state liability principle is protecting individual (economic) right from injustice and unlawful conduct of government

[676]ibid, pp. 172.See also Jackson, John H., (1992), 'Status of Treaties in Domestic Legal Systems: A policy Analysis', *America Journal of International Law* No. 86, pp. 310.

[677]Joined Case FIAMM and Fedon, Supra Note 9, para. 176

[678]See Case C-149/96, *Portuguese Republic v Council of the European Union*, (1999), ECR *I-08395*, para. 46 "To accept that the role of ensuring that Community (EU) law complies with those rules devolves directly on the Community (EU) judicature would deprive the legislative or executive organs of the Community (EU)of the scope for maneuver enjoyed by their counterparts in the Community's (EU) trading partners."

which is causing the damage, and the main function of state liability principle is to rectify or to compensate the damage borne by the individual. However, from EU experience in FIAMM Case, the ECJ held that it was not in a position to grant compensation on the basis of a WTO Law infringement, as legislative institutions should neither be hindered by the prospect of actions for damages nor put under an obligation to comply with WTO Law as a consequence of successful compensation actions.[679] Consequently, although conditions for EU liability is fulfilled in FIAMM case, the main function of state liability to rectify the damage is not accomplished due to the lack of direct effect of WTO Law in EU legal system.

From the U.S. experience, UURA definitely refuse the concept of direct effect of WTO Law in the U.S. legal system, as Barcello argued that, "the UURA doesn't have direct effect, since the meaning of direct effect as a single concept is that the WTO rules have direct effect to a private person so they must have standing in a domestic court to base a legal claim on a WTO provision as a rule of decision."[680] From the U.S. perspective, the non-direct effect itself derives from the concept of sovereign immunity adopted by the federal law of the U.S.

As one of federal laws, UURA is shielded by sovereign immunity doctrine. Although the basic point of sovereign immunity has never been a complete immunity from litigation for the government, since in recent development of federal sovereign immunity doctrine, it can be waived by several reasons; because a sovereign creates the law does not mean that he should be immune to that law.[681] But the URAA is invoking sovereign immunity doctrine to bar court entirely from hearing some individual's claim directly of legal wrong that conducted by government. Thus, theoretically if the law itself perpetuates the immunity from claim, one should notice that state liability cannot derive from the implementation of this law.

The role of U.S. congress in relation to WTO obligations, pursuant to URAA sections 123 and 129, is that the U.S. Congress can determine whether the DSB Decision will be implied in the domestic law.[682] If at any situation, the U.S Law is infringing the WTO Law, the implementation of Bill promulgated by the Congress will make clear that the U.S. law will

[679]See Joined Case FIAMM and Fedon, Supra Note 9, para. 121-122

[680]Barceló III, John J. (2006), 'The Paradox of Excluding WTO Direct and Indirect Effect in U.S. Law, in Tulane European and Civil Law Forum', *Dedicated to Preserving and Advancing the Civilian Tradition and to Strengthening Louisiana's Links with Europe : Companions and Crossroads: Essays in Honor of Shael Herman*, Tulane School of Law Journal, pp. 148.

[681]See Chapter III

[682]URAA at § 123 and 129, 19.U.S.C. § 3512(a)(2): "WTO dispute settlement decision would not apply directly in the U.S. domestic law, except by legislation approved by the Congress"

take precedents.[683] The U.S. law emphasizes the responsibility of the Federal Government, and not private citizen, to ensure that Federal or States law are consistent with the U.S. obligations under WTO Agreements.[684] Hence, in relation with the FSC/ETI Case, the Congress made effort by introducing legislative package in order to prevent retaliation from the E.U. which will be causing trade damage to their private economic actors. In conclusion, the U.S. tends to promote political accountability instead of state liability in this case. Political accountability refers to the responsibility or obligation of government officials to act in the best interest of society of face consequences.[685]Both EU and the U.S. basically rely on the political accountability by changing several regulation related to the dispute (EU-banana regime and U.S FSC/ETI Act).[686] Political accountability is a part of democracy principle when the political leaders are obliged to answer their constituent in regard with particular issue. Political accountability is a form of constitutional commitment from legislative and executive body to reform any legislative or executive bodies' product in order to prevent the violation of constitution. It is significantly exist in a good governance system together with implementation of state liability principle. the distinguish between political accountability and state liability principle is that political accountability is performed by the legislative or executive bodies, meanwhile the authority to perform state liability principle is in the discretion of judicial body. These two principle are not be able to supplant to each other, since state liability principle will be implied by judicial body in relation with compensation of the damage due to the violation of rights. This chapter nevertheless is proving that state liability principle is not accomplished due to the lack of direct effect of WTO Law; it therefore entails non-compensation action for the private economic actors.

The absence of direct effect of WTO law in both the EU and the U.S. legal system becomes a barrier for private economic actors to obtain compensation caused by the infringement of WTO Law conducted by their governments. This barrier restrains the accomplishment of state liability, where principally the main function of state liability is

[683]See interpretation of UURA Section 102. SAA gives interpretation of section 102 (a) states " if there is a conflict between U.S. law and any of the Uruguay Round agreements, the implementing bill makes clear that U.S. law will take precedence."

[684]Ibid, in Uruguay Round Agreements Act Statement of Administrative Action (H.R. REP. NO. 103-826, pt.1, at 25 (1994), as reprinted in 1994 U.S.C.C.A.N. 3773).

[685]See case No. 95-C-659-C, *Sokaogon Chippewa Community v. Babbitt*, United States District Court, W.D. Wisconsin, 929 F. Supp. 1165, (1996).

[686]For political accountability of EU Institutions to the victim of Banana regime see page 155-156.

rectifying and compensating the damage caused by the conduct of government. However, since the private economic actors are barred from getting compensation, it is causing the downfall of their trade benefits under the WTO Agreement. Meanwhile, the objective of WTO Agreement is enhancing trade benefits of economic actors of WTO Members.[687]

State liability principle is also a measure for any government to protect (economic) right of citizen, and the term of protection of rights is to render to court for any violation of right,[688] it thus requires judicial act to account the violation of right conducted by government, as a part of judicial protection for individual. However, without direct effect, this measure will not be accomplished. Coherently, the following Chapter discusses the friction between WTO law and the state liabilityin order to seek the answer to what extent is the absence of direct effect of WTO Law will affect the individual rights.

[687] See Chapter II. Van den Bossche, Peter, Supra Note 56, pp. 39.Van den Boosche argued that "WTO is merely concerned of state to secure its private economic actors in involving international trade without vexation of other state restriction or protection on trade. In addition, the WTO as international trade rules is necessary to fulfil the need of private economic actors for a degree of security and predictability of international trade. Private economic actors operating or intending to operate, in a country that is bound by such legal rule will be able to predict better how that country will act in the future on matters affecting their operations in that country"

[688] See John Locke, Supra Note330

CHAPTER V

THE FRICTION BETWEEN THE WTO LAW AND STATE LIABILITY

1. Background

Chapter IV discussed about two important points in term of the implications of WTO retaliation to private economic actors. First, the lack of direct-effect of the DSB decision in the EU legal system[689] is one of the reasons for the ECJ not to imply non-contractual liability in order to give compensation to FIAMM and Fedon Companies. And second, since the U.S. law (UURA) explicitly denies direct-effect of WTO law, private economic actors therefore are barred off to stand before the court but more to rely on legislative body to change legislation in order to comply with DSB decision.[690] From this situation, the direct-effect of DSB decision is debatable in terms of implications of the WTO retaliation, since most of WTO Member, such as the U.S. and Canada, prevent private party from invoking DSB decision and rulings before domestic courts,[691] private economic actors therefore are barred from getting compensation to recoverthe damages suffered from retaliation, to that end, without direct effect, state liability principle is challenging to be implied. Although EU Treaty recognize non-contractual liability, but it was difficult to imply it in the context of compensation caused by the WTO retaliation.

There are some arguments in regard with the direct-effect of WTO Law and DSB Decision in order to imply state liability in terms of the WTO retaliation to private economic

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[689] Von Bogdandy, Armin, (January 2005), 'Legal Effect of World Trade Organization Decision within European Union Law: A Contribution to the Theory of the Legal Acts of International Organizations and the Action for Damages under Article 288 (2) EC', *Journal of World Trade*, Vol. 39, No. 1, pp. 45-66. Bogdandyreferred that sometimes termed of direct-effect as direct applicability, invocability or elf executing nature, in sum lack of direct-effect means that an action by an individual before the ECJ cannot be based on a norm laid down in the WTO Agreements.

[690] See chapter IV

[691] Schaefer, Matt, (Winter 1997), 'Are Private Remedies in Domestic Courts Essential for International Trade Agreements to Perform Constitutional Functions with Respect to Sub-Federal Governments?', *Northwestern Journal of International Law &Business*, Vol. 17, Issue 1, pp. 609-652. The main reason that Canada and the U.S prevent private party from invoking DSB decision and rulings before domestic court is because Canada's constitutional system does not allow for direct effect of international agreements and it has chosen not to provide for private rights of action based on international trade agreements through federal implementing legislation. And the U.S. has chosen not to make recent international trade agreements "self-executing" or otherwise provide for private rights of action against either the federal or state government.

actors.[692]Although the ECJ do not make any distinction between direct effect of WTO Agreement and the DSB Decision and Rulings, this sub section discuss two different arguments between pros and cons of implying direct-effect both WTO Law and direct effect DSB Decision and Rulings to the domestic law.

2. Direct- Effect to WTO Law and DSB Decision and Rulings

The WTO Agreements do not create direct effect to the Members, thus, it depends on WTO Members to decide whether WTO Agreements may produce direct effect within their jurisdictions,[693] because in principle, international law does not interfere with the internal legal system of nations. The reception of international legal rules is left to the domestic law of each nation. It thus depends on whether a country adopts monism or dualism theories. In monist countries, international obligations are considered a part of domestic legal system with no act of transformation required, because both international law and national law have a common underlying legal basis that derives its origin from the law of nature which binds equally the state and individuals.[694]Kelsen posited that the monistic view is the result of analysis of the norms in positive international referring to the national legal orders. It comes from the standpoint that international law has connection with national law.[695] For the monist countries, international law has what is termed direct effect to their national law. Another theory is dualism theory, in dualist country, international legal obligation do not enter the domestic legal system unless an act of transformation occurs. Accordingly the difference

[692]See Joined Case FIAMM and Fedon,*Supra Note* 9, pp. 30. See also Erico, John, *Supra Note* 585,pp. 197. "In all cases for non-contractual liability arising from WTO or DSB provisions, the ECJ discusses the "direct effect" requirement of the WTO or DSB provision as a necessary predicate for finding liability." See also Petersmann, Ernst-Urlich, (2011), 'Can the EU's Disregard for Strict Observance of International law' (Article 3 TEU) be Constitutionally justified?', in *Trade and Competition Law in the EU and Beyond*, eds. Govaere, Inge, Quick, Reinhard and Bronckers, Marco, Edwar Elgar Publishing – UK, pp. 214-225. In contrary, Bronckers and Goelencriticized that the ECJ could not reject to imply community liability principle in order to award damages due the absence of direct effect of the WTO Law and DSB decision. See Bronckers, Marco, and Goelen, Sophie, (2012),'Financial Liability of the EU for Violations of WTO Law: A Legislative Proposal Benefiting 'Innocent Bystanders', *Legal Issues of Economic Integration*Vol.39, No. 4, pp. 399-418.

[693]See Cottier, Thomas, and Schefer, K.N., (1998), 'the Relationship between World Trade Organization Law, National Law and Regional Law', *Journal of International Economic Law*, Vol. 1, Issue 1, pp. 83-122.

[694]Verma, S.K., (2004), *An Introduction to Public International Law*, Phi Learning Ltd – Delhi/India, pp. 48 -50.

[695]Kelsen, Hans, (2009), *General Theory of Law and State* (translated by Anders Wedberg), Lawbook Exchange Ltd. – New Jersey/USA, pp. 363. Kelsen is protagonist to monism theory, he argued that international law and national law are two separate but mutually independent legalordersthatregulate quiet different matters and have quite different sources.

between international law and national law is fundamental. International law is binding base on the common will of states meanwhile national law is binding the individual within its jurisdiction. Since international law establishes a relation between its norms and the norms of the different national legal order, thus, direct effect of international law is not possible.[696] Some countries are a mixture of monism and dualism. In these countries, certain international obligations will enter domestic legal system directly but some others will require an act of transformation.[697]

Article XVI: 4 of the WTO Agreement require Members to ensure the conformity of their laws, regulations and administrative procedures with the WTO obligations, thus, WTO Members have they own discretion to comply with the WTO obligations. The WTO Agreements do not regulate the manner in which a state may choose to put itself domestically in the position to meet its obligation. Each member can determine in accordance with its own constitutional practice whether to give direct domestic law effect to the WTO Agreements or whether to transform, adopt or incorporate those rules into domestic law by statutes or by some other means.[698]

In term of compliance with the DSB decisions, Jackson has mentioned that states would be reluctant to change their domestic legislation in order to comply with DSB decision to avoid sovereignty diminution.[699] However, if a member decides to choose not to comply with DSB decision, the impact is getting retaliation by the winner party to the dispute is unavoidable. In the end, the retaliation is merely causing trade impact to domestic trade player in both Members.[700] This research is focusing on state liability principle in order to give compensation, although to imply state liability, state should deal with several issues in

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[696]*Ibid.See*Jacson, John H., *Supra Note* 487, pp. 314-315. See also Peter Malanczuk, Peter (ed.), (1997), *Akehurts's: Modern Introduction to International Law* (Seventh Edition), Roudledge – London/UK, pp.63. Nevertheless, in reality the opposing school between monism and dualism did not reflect actual state practice, it refer to argument of Fitzmaurice that, "the entire monist and dualist controversy is unreal, artificial and strictly based on point, because it assumes something that has to exist for there to be any controversy at all – which it fact does not exist – namely a common field in which the two legal orders under discussion both simultaneously have their sphere of activities." See Fitzmaurice, Gerald, (1957),'the General Principle of International Law Considered from Standpoint of the Rule of Law', *Recuil des Cours*,Vol. 092, No. 1, pp. 71.

[697] See Schaefer, *Supra Note* 691, pp. 609-652.

[698]See Jackson, *Supra Note* 93, pp. 79 -99.

[699]See Jackson, *Supra Note* 487, pp. 157-188.

[700]See Chapter III. See also Pauwelyn,Joost, (2003),*Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International law*, Cambridge University Press – UK, pp. 227. The suspension of obligation in response to breach, absolutely have a direct impact on individual operators.

question, such as direct effect of WTO Law and/or direct effect DSB decision in domestic legal system.

The direct-effect of DSB decision so far becomes major polemic in regard with the relation between the WTO and individual. Nothing in the WTO rules mentioned directly about this relation. However, the Panel declared in Panel Report of the *U.S. – Sections 301-310 of the Trade Act of 1974* that "under the doctrine of direct effect which has been found to exist most notably in the legal order of the EC (EU) but also in certain free trade agreements, obligations addressed to States are construed as creating legally enforceable rights and obligations for individuals. Neither the GATT nor the WTO has been so far interpreted by GATT/WTO institutions as a legal order producing direct effect. Following this approach, the GATT/WTO did not create a new legal order the subjects of which comprise both contracting parties or Members and their Nationals."[701] Accordingly, the WTO law does not oblige the Members to impose direct-effect in their domestic law, but more to discretion of the Member to establish concrete parameters of the relationship between the WTO law and domestic law.[702] To this end, there are two different points of views with respect to direct-effect of WTO Law and DSB decision, first those who see direct-effect as political decision of a state or opponent to direct effect doctrine, and second those who concern that direct-effect WTO Law and DSB Decision is important.

2.1.Argumentation about Direct-Effect of WTO Law as A Political Decision

In building the nature of direct-effect of the WTO law, some authors prefer to lead their arguments that direct-effect is a political decision.[703] It refers to Chayes opinion, "it is natural for different laws in different circumstances bind states in different ways, thus,

[701]*United States – Sections 301-310 of the Trade Act of 1974*, Report of the Panel, WT/DS152/R,22 December 1999, para. 7.72

[702]See Tsymbrivska, Oksana, (2010), 'WTO DSB Decisions in the EC Legal Order: Approach of the Community Courts', *Legal Issues of Economic Integration*Vol. 37, no. 3, pp. 185-202. See also Cottier, Thomas, (2002), 'A Theory of Direct Effect in Global Law', in *European Integration and International Co-ordinationStudies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann*, eds. Von Bogdany, Armin, Mavroidis, Petros C., and Meny, Yves, Kluwer Law International – the Hague Netherland, pp. 102,

[703]See Trachtman, Joel P. (1999), 'Bananas, Direct Effect and Compliance', *European Journal of International Law*, Vol. 10 No.4, pp. 664.Trachtman emphasized that "the grant of direct-effect to a legal rule is a political decision, as the EC and the U.S. have recognized in different ways." See also Cottier, *Supra Note 702*, pp. 99. Cottier argued that "the whole problem of direct effect is, essentially, a matter of balance of power among the EC bodies". See also Leebron, *Supra Note* 490, pp. 175-242.

critique and good positive scholarship would pursue a kind of end analysis, pointing out where the level of binding force is actually less or more."[704]

From the EU perspective, the EU Treaties, along with the Council Decision is concluding the WTO Agreement as represent the authentic political statement by the EU Member States on the issue of the WTO law.[705]Antonidas opined about direct effect of WTO Law that "If the combined interpretation of the case law, the legislative activity and the institutional practice means that the Community (EU) legal order is a dualist that one for the purposes is the application of the WTO law, then so be it. Following from this, unless the Community (EU) transforms the WTO law into the Community (EU) legal system by means of transposition into its own legal instruments, the WTO law cannot have direct-effect. This means that the Community (EU) chooses WTO law as a second best set of rules. In its internal policy making,it uses WTO law as a benchmark and accepts its primacy in its commercial policy instruments. It therefore tries to interpret legislation consistently with the WTO Agreements."[706]In fact, the ECJ needs to support the supremacy of EU Law,[707] thus the recognition of direct effect of the WTO law would deprive the ECJ from the authority to uphold the supremacy of the EU Law.[708]Bogdandy also revealed that if the WTO law has direct-effect, it will have a constitutional function for the EU legislator, because direct-effect of WTO law is the most relevant legal feature to have alleged constitutional function to stipulate the supremacy of international treaties over EU legislation. The ECJ does not exclude any effect of WTO law, but it denies direct-effect when it comes to force the

[704]Chayes, A, and Chayes, A.H., (1998), *the New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press – Cambridge MA/USA, pp. 17-22.

[705]See Kuijper, Pieter J., (1995), 'the Conclusion and Implementation of the Uruguay Round Results by the European Community', *European Journal of International Law*, Vol.6, No.1,pp. 222-244.

[706]Antoniadis,Antonis, (2007), 'the European Union and WTO Law: A Nexus of Reactive, Coactive and Proactive Approaches', *World Trade Review*, Vol. 6 No.1, pp. 45- 87, at 86. See also Eeckhout, Piet, (1997), 'The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems', *Common Market Law Review*, Vol.34, Issue No. 1, pp.11-29

[707]Timmermans, Christian, (1999), 'the EU and Public International Law', *European Foreign Affairs Review*, Vol.4, No.2,pp. 181.

[708]Antoniadis, *Supra Note* 706, pp. 86-87. The scales in the balancing act could be represent by the concepts of monism and dualism which is monism being inherently prone to accord supremacy to international law and dualism to domestic law. The catalysts for the balancing act in this sense are compatibility and direct effect. In fact, the Court, in Opinion 1/91, was quick to acknowledge the supremacy of the EU Treaties over provisions of the proposed EE Agreement. It held that the jurisdiction of the proposed EEA Court affected theallocation of responsibilities as defined by the EC (EU) Treaty and therefore, underminedthe autonomy of the Community (EU) legal order.

legislative institutions of the Union to comply with the WTO law.[709]The denial of direct-effect of the WTO law therefore is rather the political exception for the EU approach to international law.[710]Trachtman emphasized the direct-effect of WTO Law as political bargain between EU and others WTO Members. The ECJ has generally declined direct-effect of GATT obligations because other states do not accord direct-effect thereto. It would create a bargaining disparity which would have to be accorded if the U.S. denied direct-effect to these obligations while the EU accorded direct-effect. Thus according to this interpretation, the ECJ simply is upholding political bargain, as in *Portugal vs. Council* Case the ECJ suggested that the absence of reciprocity as to direct effect would lead to an imbalance of the WTO obligations between EU and its trading counterpart in WTO.[711]

Hence, the direct-effect of WTO Law also deprives the freedom of political institutions. There are two aspects of the freedom of political institutions, first, the external aspect, where the grant of direct effect is destined to weaken the negotiating strength of the institutions within the WTO in relation to the most important trading partners. Second is the internal aspect, the shift of the institutional balance in external trade matters from the Council and the Commission to the Court. The direct-effect of the DSB Decision would also have the consequence that any EU legislative measure could be challenged before the court as the WTO incompatible.[712]

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[709]Von Bogdandy, Armin, (2008), 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law', *International Journal of Constitutional Law* (I.CON), Vol. 6, No. 3&4, pp. 397-413.

[710]Weiler, J.H.H., (1999), *the Constitution of Europe*, Cambridge University Press – UK, pp. 295-298. See also Klabbers, Jan, (2001-2002), 'International Law in Community Law: The Law and Politics of Direct Effect', in *21 Year Book European Law*, eds. Eeckhout, Piet, Tridimas, T, and De Burca, G, Oxford University Press-Oxford/UK, pp. 274-275.

[711]Trachtman, *Supra Note* 703, pp. 655-678. See also Stoll, Peter Tobias, and Schorkopf, Frank, (2006), 'WTO-World Economic Order, World Trade Law', in *Max Planck Commentaries on the World Trade Law*, Max Planck Institute for Comparative Law and International Law, MartinusNihoff – Leiden/Netherland, pp.42. The provision of WTO Law does not deem to be suitable for direct application, as it considers the WTO rules to be subject to reciprocity and negotiation between the Members of WTO. In contrary, Petersmann argues that denial of direct-effect on the ground of lack of reciprocity is unjustified since almost international agreements are based on some kind of reciprocity. See also Petersmann, Ernst-Urlich, (1983), 'Application of GATT by the Court of Justice of the European Communities', *Common Market Law Review*, Vol. 20, Issue 3, pp. 426.

[712]See Jackson, *Supra Note* 487, pp. 315-319. Jackson mentioned that "direct effect would considerably strengthen the role the judiciary to the detriment of other power and thereby adversely affect the institutional balance as established in the national constitution. Beyond that, a directly effective international treaty superior to ordinary domestic legislation may be subversive to the idea of democratic representation." See also Antoniadis, *Supra Note* 706, pp. 86-87.

2.2.Opponent Argument regarding Direct-effect of DSB decision

2.2.1. Direct-effect of DSB Decision from the EU standpoint

Direct-effect doctrine has appeared in international law under several terms ranging from direct applicability and self-executing provision to direct effect.[713]EU Member States refer to classic definition of direct-effect that the objective of direct-effect is a legal provision granting rights to individual which must be upheld to national court.[714] The European Courts have authority to establish whether a DSB Decision has direct- effect or not in their cases, such in *Biret Case, Chiquita Case,the Case of Van Parys* and FIAMM Case, but none from the judgment of those cases entail justification of direct-effect of DSB Decision, except in *Biret case*, when the ECJ considered that DSB Decision in *Hormone Case* was inescapably and directly linked to the plea alleging of the infringement of SPS Agreement, the ECJ therefore criticized the GC for not having explicitly addressed whether the DSB decisions could have direct effect and provide grounds for a review of EU Institutions acts.[715]

Nevertheless, before the establishment of the WTO, the ECJ had experience to deny the direct effect of GATT 1947. The ECJ argued that the GATT had to be conceived as a trade/diplomatic tool, rather than a judicial one, and the flexible and imprecise agreement is incapable of conferring rights that citizens can invoke in domestic courts to challenge the lawfulness of a EU act, also preclude the Court from taking provisions of GATT into consideration to assess the lawfulness of a regulation in an action brought by a Member State.[716]The ECJ still implies this concept after the 1994 of WTO establishment, although in *Biret Case*, the court introduced an innovative conceptual distinction between the direct effect of WTO rules and reliance on the DSB Decision, thus, private economic actors potentially could be permitted to invoke a DSB Decision condemning the EU as a basis for claiming damage before the ECJ pursuant to Article 288 EC Treaty (340 TFEU).[717] But the ECJ

[713]Klabbers, *Supra Note* 710, pp 272.

[714]Denza, Eilleen, (2002), *The Intergovernmental Pillars of the European Union*, Oxford University Press – Oxford/UK,pp. 14, see also Cottier, *Supra Note* 702, pp. 105. Cottier mentioned that "direct effect may be prescribed or prohibited by the agreement or domestic legislation. Usually, the matter is left for decision to the judge on a case by case basis. Courts have asked as to whether a provision is sufficiently precise for having direct-effect."

[715]*See* Case C-93/02 P, *Biret International SA* para. 56; Case C-94/02 P, *ÉtablissementsBiretetCie SA* para. 59.

[716]Case C-280/93, *Federal Republic of Germany v. Council of the European Union*, [1994] ECR I-4973, para. 5073. See also Case C-21/72, *International Fruit Co. v. ProduktschapvoorGroenten en Fruit*, (1972) ECR 1219.

[717]Thies, Supra Note 444, (Kindle) Location 317. See also Bronckers, Marco, Supra Note 590, pp. 885-898.

rejected to give compensation because *Biret* did not suffer any damages after the expiration of the reasonable period of time to comply with the ruling. The reason was that *Biret* went out of business in 1995, while the fifteen-month implementation period ended in May 1999. The ECJ therefore considered that there was no causal link between the damage and the act of EU Institutions.[718] And the most prominent argument from ECJ is that the court mostly relied on concern over the lack of reciprocity principle as a powerful reason to reject the direct effect of the WTO law.[719]The ECJ added in their judgment that evaluating the invocability of a DSB ruling is a conceptually separate problem from the implementation of direct effect of DSB decision. The ECJ also argued that giving possibility for private party to claim compensation for damage does not amount to the recognition of direct effect.[720]Thus, the ECJ recognized the argument relating to the legal effects of DSB decision is autonomous from that pertaining to the direct effect of WTO Law. Although, it confirms that the previous judgment did not tackle the issue of direct effect of the DSB.[721]

In *Chiquita case*, the Court is also giving argument in regard with non-direct effect of DSB decision, mentioned that "since the WTO Law has no direct effect, an action for non-contractual liability directly based on an infringement of WTO Law would be bound to fail"[722]. However, similar to *Biret case*, in *Chiquita case*, the Court considered "the DSU does not establish a mechanism for judicial resolution of international dispute by means of decision

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[718]Case T-174/00, Biret International SA v. Council para.57 (Jan. 11, 2002), *available at*(http://europa.eu.int) Case T-210/00,ÉtablissementsBiret et Cie SA v. Council para. 64 (Jan. 11, 2002), *available at (*http://europa.eu.int) last visited December 2012. The ECJ rejected the appeal of Biret Company because according to the court a right to recover damages suffered before the end of the deadline would render ineffective the grant of a reasonable time period for compliance with the DSB ruling.

[719]*See* Case C-149/96, Portuguese Republic v. Council, 1999 E.C.R. I-8395, and see also FIAMM vs. Council, *Supra Note* 16. The ECJ argument in regard with the reciprocity is merely realpolitik argument rather than legal argument. See also Cottier, *Supra Note* 526, pp. 105. See also Snyder, Richard Carlton,(1948), *The Most Favored Nation Clause*, King's Crown Press- NY/USA, pp.366-367. The EU has to maintain the balance between its various institution and members, and minimizing possible negative implications on its legal order from evolving system like GATT (or WTO today).

[720]Nsour, Mohamad F. A., (2010), *Rethinking the World Trade Order towards A Better Legal Understanding of the Role of Regionalism in the Multilateral Trade Regime*, Sideston Press – Leiden/the Netherland, pp. 194. Nsour opined that" Biret case can be considered a modest but promising start for creating a better legal nexus between a key RTA like the EU and the Multilateral system."

[721]See Di Gianni, Fabrizio, and Antonini, Renato, (2006*)*, 'DSB Decisions and Direct Effect of WTO Law: Should the EC Courts be more Flexible when the Flexibility of the WTO System has Come to an End?',*Journal of World Trade*,Vol. 40 No. 4, pp. 777-793.

[722]*Ibid*, pp.784. See Case T-19/01, *Chiquita v. Commission*, Judgment of 3 February 2005,

with binding effect comparable with those of a court decision in the internal legal system of the Member States."[723]

In *Van Parys case*, the ECJ observed that "obliging courts to set aside rules of domestic law when they are found to be incompatible with WTO rules would hinder the possibility of reaching a negotiated solution. Moreover, requiring the Community (EU) courts to review the legality of Community (EU) measures in the light of the WTO rules, on the sole ground that the time-limit for implementation of the DSB decision has expired, could undermine the Community's (EU) position in trying to reach a mutually acceptable and WTO conforming solution to the dispute."[724] In the *Case of Van Parys*, the ECJ concluded that *Van Parys* did not have the possibility to invoke before a national court, the incompatibility of EU measures with certain WTO rules, even though the DSB had declared the EU legislation to be incompatible with those rules.

In FIAMM and Fedon case, the ECJ made another statement regarding direct effect of DSB Decision, since those companies requested the Court to make distinction between the direct effect of provision of WTO Agreements which impose substantive obligations, and the direct effect of a ruling of the DSB. Nevertheless, according to the Court, its case law shows that such distinction cannot be made. "DSB decision, which has no object other than to rule on whether a WTO member's conduct is consistent with the obligations entered into by it within the context of the WTO, cannot in principle be fundamentally distinguished from the substantive rules which convey such obligations and by reference to which such a review is carried out, at least when it is a question of determining whether or not an infringement of those rules or that decision can be relied upon before the Community (EU) courts for the purpose of reviewing the legality of the conduct of the community (EU) institutions."[725] Hence, in this case the Court put aside again the direct effect of DSB decision.

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[723]Case Chiquita v Commission,*ibid*. See also Cygan, Adam, (2011), 'The European Court of Justice and External Relations: Internationalist Objectives or Integrationist Policy', in *The European Union and Global Governance: A Handbook*, eds. Wunderlich, Jen Uwe, and Bailey, David J., Routledge International Handbook- UK, pp.112. The Court's case law recognizes the importance of the Community International Trade obligations, but the policy of the judgment is that direct effect will only be permitted when WTO decision are themselves binding on all members.

[724]Case C-377/02 *Van Parys v BelgischeInterventie- en Restitutiebureau*, Judgment of 1 March 2005.See Egli, Patricia, (2006), 'Le´on Van Parys NV v. BelgischInterventie- en Restitutiebureau: ECJ judgment on effect of WTO agreements and dispute settlement decisions in EC law', in 'International Decisions', ed. Daniel Bodansky, *American Journal of International Law*, Vol. 100 No. 2, pp. 449- 454

[725] Joined Case FIAMM &Fedon, *Supra Note* 9, see also Eeckhout, Piet, (2011), *EU External Relations Law (Second Edition)*, Oxford University Press – Oxford/UK, pp.372. There was no basis for distinction between direct effect of WTO rules imposing substantive obligations and direct effect of a DSB decision. A DSB Decision could not in principle be fundamentally distinguished from the WTO Agreement as substantive

2.2.2. Direct Effect of DSB Decision from the U.S. standpoint

From the U.S. perspective, WTO supremacy is excluded as an option for the U.S. legal system. A subsequent federal statute always overrides a prior self-executing or having direct-effect international agreement. Although, the decision of DSB in principle entails an obligation, it cannot be self-executing or directly applicable in the strict meaning of the words, thus, it cannot give rights for individuals.

However, there are some arguments leading to the concept indirect effectof DSB Decision in the U.S. legal system.[726] Although the U.S. has declared that reports issued by Panel or the Appellate Body under the DSU have no binding effect under the law of the United States and do not represent an expression of the U.S foreign or trade policy[727], but the U.S. courts can engage in indirect application of DSB Decision. For example, in order to apply a DSB decision that found a particular U.S. measure WTO- inconsistent in a domestic case which is involving a similar but not identical with the U.S. measure, the court would be applying the DSB Decision indirectly. Furthermore, it has to be pointed out that the inconsistency of a U.S. measure or provision with the WTO law can concern federal statutes or regulations or practice of executive agencies. It will emerge indirect-effect by drawing the consequences from the inconsistency of a U.S. interpretation of a WTO law provision in a federal status, the regulation or practice with an adopted DSB Decision against the U.S. relating to it where the WTO inconsistency refers to the ambiguous legislative measure. The U.S. courts therefore could infer authority from DSB rulings.[728]The indirect-effect doctrine has surfaced most prominent in the U.S. in connection with trade remedy law, such as antidumping, countervailing duty, and safeguards (or escape clause) law. For example in the

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rules which convey such obligations. To support this finding the court again referred to the general reason for the lack of direct effect of WTO law where the nature of WTO agreements is reciprocity and flexibility, room for discretion and scope for negotiation and also referred to Article 3 (2) DSU.

[726]Barceló III,*Supra Note* 680, pp. 147-167. In the U.S. international agreements are given indirect effect based on the Charming Betsy canon of interpretation of federal statutes that first articulated in the early Supreme Court Case of Murray v. the Charming Betsy. See also Jackson, John J, Davey, William J.,and Sykes, Alan O. (2002), *Legal Problems of International Economic Relations: Cases, Materials, and Text on the National and International Regulation of Transnational Economic Relations*, West Publishing Company – NY/USA, pp. 244.

[727]Neither federal agencies nor state governments are bounds by any finding or recommendations included such reports, See the interpretation of section 102 (c) of the SAA In*H.R. DOC. NO.103-316, at 676* (1994).

[728]Gattinara, Giacomo,(2009), 'The Relevance of WTO Dispute Settlement Decision in the U.S. Legal Order', *Legal Issues of economic Integration*, Vol. 36 no. 4, pp. 285-312.

Allegheny Case[729], a case regarding countervailing duties, the court referred to *Charming Betsy* doctrine[730]when considering the effects of a DSB decision. In this case, the court had to judge on a methodology followed by Department of Commerce to calculate a countervailing duty to be applied against a subsidized company. In order to comply with the recommendations of DSB, Department of Commerce changed the methodology to calculate the countervailing duty according, and adopted new decision, although it would have applied only to future investigations. Accordingly, the judgment of the Court did not take new decision, since it remained consistent with the interpretation of DSB Decision.[731]

Principally, the U.S. courts do not give direct effect, and if there is indirect effect to WTO law within the U.S. legal system, it is severely circumscribed and subordinated to political process, because it will derive from political pressure from import competing interest. The Executive Branch, in favors of WTO compliance, is certainly capable to this political pressure. However, legitimizing political pressure can achieve a kind of optimality by maximizing political support for open trade by supporting open market initiatives whenever the costs to import competing interests are not excessive. Thus, political leaders who anticipate pressure to aid injured industries may be more willing to make trade concessions across the board if they know that they can respond the interest party by changing the policy.[732]The use of *Charming Betsy* doctrine is more a political responsive in a way to achieve indirect effect rule for the WTO, but it is not a choice with a forgone conclusion for an open trading system. It is likely if direct effect is granted, it would pose a big threat to trade remedy law in the U.S. legal system. Since domestic application of trade remedy rules through agency action and deferential court review still holds open avenues for the exertion of political pressures, especially through the agencies. Panel and Appellate Body decisions at the WTO level would be insulated from such influence. Hence, using direct effect principle

[729]*Allegheny Ludlum Corp vs. U.S*., 367 F. 3d 1339 (Fed. Cir. 2004).

[730]See case*Murray vs. Schooner Charming Betsy*, 2 Cranch 64, US 64, 2L.Ed. 208 (1804). See also C.A. Bradley, C.A., (1998), 'The Charming Betsy Canon and Separation of Powers: Rethinking of the Interpretative Role of International Law',*Georgetown Law Journal*, Vol. 86, No.7, pp. 491. Charming Betsy Doctrine remain the doctrine that is used by the national court, in case a possible conflict between a domestic provision and an international obligation, the national court shall look first of all at the content of the national rule and see if there is scope for interpretative. In fact, in such a case, an unambiguous statute will definitely prevail over a conflicting international obligation.

[731]The basis claim of Allegheny Ludlum Corp. is the DSB Decision on *United States – Countervailing Measures Concerning Certain Products from the European Communities, WT/DS212/AB/*R (9 Dec. 2002).

[732]See Sykes, Alan O., (2004), 'the Persistent Puzzle of Safeguards: Lessons from the Steel Dispute', *Journal of International Economic Law*, Vol. 7, Issue 1,pp. 523-564.

for DSB Decision will curtail protectionism that clearly some import competing industries would not want those decisions to have direct effect.[733]

The status of DSB decision in the U.S. legal system has received significantly less consideration[734], becausethere is not necessary to give direct effect in order to solve the problem of non-compliance of DSB decision, since domestic litigation might serve as a substitute for, rather than a complement to. And in general, if the reason to give direct-effect of DSB decision in domestic courts will enhance the certainty and predictability of the WTO law, it would likely produces inconsistent judicial interpretations in over 157 WTO Members States, because the frequent disagreements are inevitable when hundreds of domestic courts are all independently empowered to identify the best readings of ambiguous treaty text and dispute resolution reports.[735]

2.3. The Importance of Giving Direct-Effect to WTO Law and DSB Decision

Unlike those who opponents to direct effect of WTO Law, there are some arguments in regard with the importance of giving direct-effect to the WTO law.[736] It mostly relates to the rights of individual to invoke treaty provision before the domestic court. Tumlir is a pioneer in supporting direct effect of economic treaty in general from individual standpoint. He argued that "one can imagine the international economy policy commitments of government to be undertaken in the form of self-executing or directly effective treaty provisions, creating immediate private rights enforceable against one's own government. These rights would be enforceable in national courts only with no sacrifice of legal sovereignty."[737]Tumlir emphasized the notion of direct-effect is 'granting right to individual

[733]Tarullo, Daniel, (2002) 'The Hidden Costs of Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions', *Law and Policy in International Business*, Vol. 34, No.1,pp.109-180

[734]See Davies, Arwel, (2007), 'Connecting or Compartmentalizing the WTO and United States Legal Systems? The Role of the Charming Betsy Canon', *Journal of International Economic Law*, Vol.10, Issue 1, pp.117-149.

[735]Dunoff, Jeffrey L., (2008-2009), 'Less than Zero: the Effect of Giving Domestic Effect to WTO Law', *Loyola University Chicago International Law Review*, Vol. 6 Issue 1, p. 279 -310.

[736]Cottier, Thomas Cottier, (2007), *the Challenge of WTO Law: Collected Essay*, Cameron May – London/UK, pp. 272.

[737]Tumlir, Jan, (1983), 'International Economic Order and Democratic Constitutionalism', ORDO –*Jahrbuch Fur die Ordnung von Wirtschaft und Gesselschaft* Vol.34, pp. 71-83. See also Bourgois, J.H.J. (1996), 'the Uruguay Round of GATT: Some General Comments from an EC standpoint', in *the European Union and World Trade Law after the GATT Uruguay Round*, eds. Emilou, N., and O'Keefe, D., John Wiley & Sons – New York/USA, pp. 86-90. Bourgois argued "what is in the end the use of making law, also international law, designed to protect private parties, if these private parties cannot rely on it?", in Cottier, Thomas, and

for judicial protection derives from the International Treaty'. Moreover, using the judicial protection would also be a safeguard for individuals who suffered damage from protectionist national policy. For example, the reason for the claim of *Biret* and FIAMM was because the EU deliberately maintenance WTO inconsistent measures on behalf to protect its national policy. Hence if the WTO Law was granted direct effect, individual could invoke its provisions before domestic courts and it would be a form of judicial protection available to those citizen harmed by protectionist national policy.

The idea of giving direct effect in order to grant the rights of individual is also posited by Moser. He argued that "the domestic foreign trade laws of most states circumscribed the discretionary trade policy powers of governments only in vague terms, and protection of individual rights and judicial review are often less developed in the trade policy than in other fields of domestic economic regulation. Trade restrictions can also be used as a mean of escaping the legal disciplines of domestic economic law. It causes harmful 'external effect' not only to domestic consumers and export industries, but also to foreign trading nations." Moser emphasized that an open international economic order is not dependent on international enforcement, but it will emerge if national governments protect certain basic rights (individual) and only if international contracts are enforced in the national courts.[738]

In terms of giving direct effect to WTO Law, Van den Bossche also underlined the main argument in favor of the idea of granting direct effect is the argument of judicial protection for individual. If individuals could rely on the provisions of the WTO Agreement, their rights to trade freely with foreigners would be judicially protected and enforced.[739] Similar to arguments above, Kuilwijk argued that "in the EC (EU) perspective, the EC (EU) and those Member States have committed themselves at the international level to opt only for the first best policy instrument. These policy instruments provide for the quickest and least harmful route to economic welfare. Policy instruments which are not compatible with GATT

Schefer, K.N., (1998), 'The Relationship between World Trade Organization Law, National and Regional Law', *Journal of International Economic Law*, Vol. 1, No. 1, pp. 83-122.

[738]Moser, Peter, (1990), *The Political Economy of the GATT* ,VerlagRuegger – Switzerland, pp. 141-150.

[739]Van den Bossche, *Supra Note* 56, pp. 65-67. Contrary to this argument, Evans argued that "there is no clear answer to the question whether the provisions of WTO have direct effect, or whether they give rights to individuals and whether the individual can invoke these rights in the national courts." See Evans, Gail Elizabeth, (2000), 'Law Making Under the Trade Constitution : A study in Legislating by the World Trade Organization', in *Studies in Transnational Economic Law*, Vol. 14, Kluwer Law International – The Hague/ Netherland, pp. 214

law must be considered, per definition, manifestly erroneous. The Court would thereby also better to protect the individual rights of Community (EU) traders."[740]

Another argument is the effectiveness of WTO Agreements. By giving direct effect, domestic court is able to review the implementation of WTO Agreement by legislative body. It should give value to the effectiveness of WTO Agreements. Brand argued that principally international law would be effectively enhanced through the observance and application in domestic law. But if international law has no real effect on people's lives, then its value is substantially diminished. And if international law has real effect on people's lives, but those people have no access to its application, this also diminishes its value. The concept of direct effect of international economic law therefore carries great significance in the development of the relationship between the individual and international law. Governmental institutions cannot ignore the importance of this concept to the developing global legal framework.[741]

In the European Court, some opinions are also relating to the protection of individual rights under the WTO Law, for example AG Alber in *Biret case* who emphasized that the WTO norms have as their object to protect individual, thus it should be directly applicable. Alber also proposed ECJ to declare that WTO law has direct-effect in the framework of damages action, because the fact that the WTO infringed are embodied in DSB Decision would entitle private parties to invoke them once the reasonable period of compliance has expired.[742] Moreover, AG Alber considered that granting binding effect to DSB decisions will not weaken the trading position of the EU, as Members of the WTO cannot decide to maintain rules contrary to WTO Law. Alemano commented that, "allowing individuals to rely on DSB Decision and Rulings to seek compensation for damages deriving from non-compliance may strike a better balance between the interests of member states and their private business operators, and the invocability of DSB rulings could improve the relationship between private operators and the multilateral trading system without modifying its flexible nature."[743] He

[740]Kuilwijk,Kees Jan, (1996), *The European Court of Justice and the GATT Dilemma: Public Interest versus Individual Right*, Nexes Edition Academic Publisher – The Netherland, pp.257

[741]Brand, Ronal A.,(1997), 'Direct Effect of International Economic Law in the United States and the European Union',*Northwestern Journal of International Law & Business*, Vol. 17, Issue 1 Winter, pp. 557 – 608.

[742]Opinion of Advocate General SiegbertAlber in *Cases C-93/02 P and C-94/02 P, Biret International SA and EtablissementsBiret et Cie. SA v. Council of the European Union*, in EU Press Release, CJE/03/39, 15 May 2003, pp. 120.

[743]Alemanno, Alberto, (2004), 'Judicial Enforcement of the WTO Hormones Ruling Within the European Community: Toward EC Liability for the Non-Implementation of WTO Dispute Settlement

referred to the argument of Advocate General Alber in *Biret Case* who argued that, "the recognition of the direct effect of Panel or/and Appellate Body rulings would not reduce the margin of discretion that WTO members enjoy in the implementation process, because once the DSB has issued a ruling, there is no more room for negotiation, the DSB recommendations must be implemented."[744]His opinion is strengthening the opinion of AG Maduro in FIAMM case who underlined that "there can be still a room for application of the WTO rules by the courts only in so far as that would not affect the scope for negotiations for the WTO disputant parties, even in the event of the dispute itself. It is because political freedom to negotiate continues to exist if the reasonable period of time for implementation of the DSB Decision had not yet expired. But, FIAMM and Fedon have fair point in seeking compensation due to incompliance with the DSB Decision, since the reasonable period that the EU had been allowed to comply with the DSB Decision had expire on 1 January 1999."[745]However, the European Courts declined to consider rights of individual to invoke a WTO decision in order to set aside domestic legislation.[746]

Cottier argued that the court should be able to protect citizen or private economic actors from denial of justice due to violation of WTO Agreements. Because Members of WTO are bound by dispute settlement decision as a matter of international law, the domestic court and domestic authority therefore should take into account the legalization of the DSB Decision and its guarantees of due process and fairness as a matter of domestic law. In principle, DSB Decision should be implemented and the court should refrain from applying domestic rules found to be inconsistent with DSB Decision.[747]Cottier refers to the idea of Tumlir regarding the importance of granting right for individual to invoke treaty provision before domestic court.,Tumlir emphasized that direct effect of trade treaties as a weapon against inherently protectionist tendencies in domestic law systems. He suggest to grant individuals the right to invoke treaty provision before their domestic courts in order to protect

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Decisions?',*Harvard International Law Journal*, Vol. 45, Issue 2, pp. 560.

[744]*SeeC-93/02 P, Biret International SA* para. 63-64; Case C-94/02 P, *ÉtablissementsBiretetCie SA* para. 66-67

[745]Opinion A.G. Maduro, *Supra Note* 509,

[746]See *BiretInternationalSACase,*para. 59

[747]Cottier,Thomas, and Oesch, Mathias, (2001), 'WTO Law, Precedents and Legal Change', *Turku Law Journal* Vol. 3, No. 1, pp. 27-41.

them from protectionism of national policy that put in to effect by other national interest group.[748]

Another argument is about indirect effect of WTO Law when Bronckers analyzed the responsibility for the conviction government toward international economic law in EU. He argued that "the WTO's domestic law effect must give a place to the conviction that international economic law is to be meaningful to private parties, as well to the responsibility the EU and its institutions, they have to manage this international system sensibly in a way that takes the effects on European interests overall duly into account." Bronckers emphasized that direct effect can be more flexible instrument where international economic agreements are concerned. One important principle developed by the court is that treaty consistent interpretation, whenever an EU measure permits several interpretations, the court feel obliged to choose the interpretation that is consistent with relevant agreement, the EU Court therefore develop technic to pay respect to international rules and rulings even without granting them direct effect. In this position, Bronckers is more perceptive to indirect effect doctrine.[749]

The major point from arguments above is that direct effect of WTO Law and DSB decision is important in order to give certain judicial protection for individual in terms of implication of WTO retaliation. Direct effect of WTO law is also a measure for the effectiveness of international trade law where the effectiveness depends on whether international trade rules are complied with by governments and whether compliance with the norms actually has a constraining influence on protectionist measures and thereby furthers the goals of the WTO rules.[750] However, giving direct effect of the WTO Law is not simple; many contradictory arguments appear which is entailing the friction between WTO law and state liability principle. In recent research some scholars such as Pettersmann, Cottier and Trachtman even tried to penetrate the idea of constitutionalization of the WTO Agreements,

[748]Cottier, Thomas, and Scheffer, N.K., (1998), 'The Relationship between World Trade Organization Law, National Law and Regional Law', *Journal of International Economic Law*, Vol. 1, issue, 1, pp. 83-122. See also Van den Bossche, and Zdouc, *Supra Note* 100, p.67. The idea of Tumlir refers to the concept of constutituzionalization of the WTO law based on fundamental right which is also advocated by Petersmann. See also Petersmann, Ersnt-Urlich, (1988), 'Grey Area Trade Policy and the Rule of Law', *Journal of World Trade* Vol. 22, Issue 2, p. 23-44.

[749]Bronckers, Marco, (2011), 'The Domestic Law Effect of the WTO in the EU – a Dialogue with Jacques Bourgeois', in*Trade and Competition Law in the EU and Beyond*, eds. Govaere, Inge, Quick, Reinhard, and Bronckers, Marco, Edwar Elgar Publisher – Glos/UK, pp. 240 - 256.

[750]Schaefer, *Supra Note* 691, pp. 609-652. Schaefer focused on constitutional function of the WTO where one of the constitutional functions of the WTO is effectiveness of the WTO rules which can be measured by the direct applicability of WTO norms in the domestic court on behalf of individual's right of judicial protection.

in order to build direct effect doctrine in a way to give deepen reason for what the WTO Agreement is purposed to be.

2.4. Building Direct-effect of WTO Law from Constitutional Approach of WTO

Some arguments are leading to the constitutional approach to build direct effect of WTO Law where central implication on constitutional approach to the WTO Agreement is constitutional norms. Constitutional norms are rights (individual rights) and therefore the WTO system should evolve to a point where individuals rather than states can rely on directly enforceable of WTO law or it is called "direct-effect".[751] This constitutional norm of the WTO law is articulated by Petersmann who sets up the idea about right-based constitutionalization. He argued that the WTO Agreements should be read as constitutional instrument. Based on this understanding, the WTO Agreement does not only employ formal techniques as constitutional method, but also includes various substantive principles as constitutional principles. These constitutional methods and constitutional principle are characteristic of constitutionalism. WTO law can thus be conceived a part of multilevel constitutional framework in multilevel trade governance. Moreover, the WTO constitution complements with national constitutions of national governments.[752] The WTO Agreements may also consists not only rights and obligations among states, but also governmental obligations to protect private rights, such as right to trade[753] and private right to judicial remedies.[754] From this point of view, Petersmann posited that a concept of right-based

[751]Howse, Robert and Nicolaidis, Kalypso, (2007), 'Enhancing WTO Legitimacy Constitutionalization or Global Subsidiarity?', in *The WTO System: Law and Legitimacy*, ed. Howse, Robert, Cameron May Ltd. – London/UK, pp.247 – 268. However, Howse criticized that, "constitutionalism is viewed as the mean of placing law, or the true of law, above politics. WTO constitutionalism is achieving such a result with respect to economic rights – limits that are attributed to the capture of domestic politics. In short, a constitutitionalized WTO attempts to place economic freedom above politics. For us, however, just the reverse is necessary to address the legitimacy crisis of the multilateral trading order, more politics needed, not less."

[752]Petersmann, Ernst-Urlich, (2006), 'Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism', in *Constitutionalism, Multilevel Trade Governance and Social Regulation*, eds. Joergens C. and Petersmann, Ernst-Urlich, Hart Publising – Oxford/UK, pp. 32-33. Contradictory with Petersmann concept of constitutionalization of WTO, Howse argued that the term of constitutionalization is the fallacy of constitutionalism; see Howse and Nicolaidis, *Supra Note* 225, pp. 307-348.

[753] Right to trade is recognized as fundamental rights according to ECJ in the Case 240/83, ADBHU, [1985] ECR 531, at 548

[754]See Cass, Deborah Z.,(2003), 'China and the 'Constitutionalization' of International Trade Law', in*China and the World Trading System : Entering the New Millennium*, eds. Cass, Deborah, Williams, Brett G., and Barkers, George, Cambridge University Press – Cambridge/UK, pp. 50. Right of private to judicial remedy is one of the examples for the effect of constitutionalization of WTO upon China, especially in the area of intellectual property rights.

constitutions is a democratic governance powers restrained by comprehensive guarantees of fundamental rights.[755] Furthermore, WTO constitution can also help to set up multilevel restraint and to prevent human rights of citizen from being abused by government power. The right-based constitutionalization in the WTO is aimed to balance the state centered concept built in the establishment of the WTO, because like other international agreement, the WTO is perceived as intergovernmental rights and obligations among states to protect freedom and non-discrimination in international economic relations without corresponding to individual rights.[756] The international trade relations thus need a value balance between state centered concept and right-based concept where the prominent value of international trade is correctly delivered in terms of individual benefits from global trading. The value balance is to mitigate the arbitrary power of government, as Petersmann noticed that government powers risk being abused for distorting market competition and for redistributing income for the benefit of powerful group interests.[757] The constitutionalization of WTO requires the subjection of WTO members to the rules and obligation of WTO which can be realized along the route of direct-effect or direct applicability of WTO rules by national court.[758]

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[755]See Petersmann, Ernst-Urlich, (1998), 'How to constitutionalize International Law and Foreign Policy for the Benefit of Civil Society?',*Michigan Journal of International Law*, Vol 20, No.1,pp. 1-30. Petersmann adopted concept of a constitutions that can be used in a broad sense for the basic legal framework of a given human community which defines the common rules for ensuring equal freedoms under the rules of law and sets up institutions and decision-making processes for the making administration, and judicial enforcement of rules. In contrary to this argument, Dunnof argued that "The WTO treaties do not enshrine a series of fundamental rights, much less a fundamental of freedom of trade, the Uruguay Round Agreement is silent about this." See Dunnof, Jeffrey L., (2009), 'the Politics of International Constitutions: the Curious Case of the World Trade Organization', in *Ruling the World?: Constitutionalism, International Law, and Global Governance*, eds. Dunnof, Jeffery L., and Trachtmann, Joel P. Cambridge University Press – NY/USA, pp 189.

[756]Petersmann, Ernst-Urlich, (2002), 'Constitutionalism and WTO: from a State – Centered Approach towards a Human Rights Approach in International Economic', in *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec*, eds. Kennedy, Daniel L.M., and Southwick, James D., Cambridge University Press- Cambridge/UK, pp. 32-67. Petersmann argued that "from a democratic perspective, rights of states are merely derivative of the rights of their citizens; sovereignty must be understood not as "freedom of governments" but as "popular sovereignty" constitutionally limited by human rights and democratic principles."

[757]Petersmann, *Supra Note* 755, pp. 1-30. Petersmann's writings on the constitutional functions that trade agreements could serve bylimiting governmental discretion to takewelfare reducing protectionist measures against the long-term interests of a nation and contrary to individual economic liberty.

[758]Petersmann, Ernst-Urlich,(1995), 'Rights and Duties of Their Citizens: Towards the "Constitutionalization" of the Bretton Wood System Fifty Years after its Foundation' , in *RechtZwischenUmbruch and Bewahrung: Festschrift fur Rudolf Benhard*, eds. Beyerlin,U.,Bothe, M., Hoffmann, R., and Petersmann, E.U., Springer Verlag – Berlin/Germany, pp. 1087 – 1128. In contrary with Petersmann, Cho argued that "those who favor the constitutionalization on international trade law might believe that a domestic judicial system can and should serve to materialize certain fundamental treaty provisions, always allowing individuals to sue their own governments for damages they have incurred as a result of the violation by their governments of specific

Cottier is one of the WTO constitutionalists who purposed a classic constitutionalism where direct effect of suitable provisions of WTO law would enable the domestic judiciary to check the Member's executives and legislative body who have unlimited discretion in applying WTO rules. It means that constitutionalism of WTO is to control political power in order to safeguard the autonomy of the individual. The constitutional approach to the judiciary also permits us to appraise the WTO dispute settlement institutions and the national courts as forming one multilevel judiciary.[759]It is coherence with the concept of legal constitutionalization of WTO law where the one of features of legal constitutionalization of WTO is direct effect. Although direct effect is not necessarily relevant feature in domestic constitutionalization, but it may have significance in an international setting. Because direct effect actually involves the integration level such in multilevel judiciary, the utilization by international legal rules of the more binding dispute settlement is available in domestic law. For example, by finding that EU law had direct effect in the courts of member states, the ECJ both gave EU law greater binding effect and gave individuals greater control over the development of the EU law.[760]

Constitutional approach of WTO principally is not merely about building direct effect to the WTO law, but also concern to the effectiveness of WTO. If domestic court is giving direct-effect to WTO law, thus, the WTO is effective in term of its relation with individual. Furthermore, the domestic court can give a value balance between the right of individual derives from WTO law and the legislative power. This value balance will give normative influence when the court needs to imply state liability in order to give compensation caused by the WTO retaliation to private economic actors (individual).

However, until today, the concept of direct effect to the WTO law is still only a set of ideas, although direct effect is an essential requirement to imply state liability principle in term of WTO retaliation to private economic actors, but the majority of WTO Members

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treaty provisions, yet regardless of its value as a legal *ideatypus*, thus this argument lacks of practical foundation at the present time and it is simply radical." See Cho, Sungjoon Cho, (2003), *Free Markets and Social Regulation: A Reform Agenda of the Global Trading System*, Kluwer Law International – The Netherlands, pp. 155.

[759] See Cottier, *Supra Note* 702, pp. 99-123. See Also Cottier, Thomas, and Mavroidis, Petros, C., (2003), 'Concluding Remark',in*The Role of the Judge in International Trade Regulation: Experience and Lesson for the WTO*, eds. Cottier, Thomas, and MavroidisPetros C., Michigan University Press - Ann Arbor/USA, pp. 349, 353.

[760]Trachtman, Joel P., (June 2006),'The Constitutions of the WTO', *European Journal of International Law*, Vol. 17, No. 3, pp.623-646. Robert Howse criticized this legal constitutionalization of WTO because constitutionalization was made acceptable in Europe by characteristic whose functional equivalent, it cannot be obtained at the WTO level. See Howse and Nicolaidis*Supra Note* 575, pp. 259.

decline to imply direct-effect doctrine to WTO Law based on political argumentation. The pro and contra arguments in respect to direct effect eventually brings lots more friction to imply state liability principle in order to give compensation to private economic actors.

3. The Friction between WTO Law and State Liability

WTO Law is not only about rights and obligations to conduct international trade among Members, but also commitments from government to their private economic actors. These commitments areconceivable to support their private economic actors to achieve better income and benefit, to promote positive result of enhancing welfare, full employment and large volume of real income for individual under the WTO Law.[761] Hence, the WTO Agreementsindirectly provides wide opportunity for private economic actors to achieve trade benefits through their government commitments, where these commitments constitute as rights of private economic actors (individual in general) to trade freely across frontier, to enhance their benefits from international trade under the WTO agreements, and at the end to obtain their economic rights.

Although the WTO Agreements do not mention directly about rights of private economic actors, but in WTO Panel Report of *the case Section 301 – 310 of US Trade Act of 1974* enshrined the relation between individuals and WTO law through the commitment of their governments. Panel explained that "It would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of the individual economic operators in the national and global market places. The purpose of many of these disciplines indeed one of the primary objects of the GATT/WTO as a whole. It is to produce certain market conditions which would allow this individual activity to flourish. Providing security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the WTO preamble. The security and predictability in questions are of the multilateral trading system is per force composed not only of states but also, indeed mostly of individual economic operators. The lack of security and predictability affects mostly these individual operators.

[761] See Shell, G. Richard, (1995), 'Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization', *DUKE Law Journal* **No**. 44, pp**.** 830 – 925, at 877-78. See Chapter VI.

Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that Members benefit from WTO discipline."[762]

It can be drawn from the Panel report above that the relations between individual and WTO Law is merely depending on whether the government is willing to provide and protect the rights of individual to achieve better benefits from international trading under the WTO Agreements. Thus, when their rights are violated, it also depends on the government to rehabilitate the rights by giving compensation from it. On the other hand, state liability principle engages with the prospective of balancing and rehabilitating individuals rights because of the violation conducted by the governments.

The concept of state liability from government to individual is not recognized by the WTO law. Because the nature of remedy in WTO Agreements as public international trade law is subject to international state responsibility principle when a Member violates the WTO law, it will entail an obligation to give appropriate remedy for violation of the rights of other Member.[763]It is widely recognized that private trade remedy is subject to national law. It thus depends on the domestic legal system of the member to imply state liability principle in terms of violation of WTO. Unfortunately, the absence of direct effect creates a friction between WTO Law and state liability. State liability in general requires a willingness of the court to review the legislative product that violates individual rights, but without direct effect of WTO Law, the court is unable to review the national policy relating to WTO law.[764]The absence of direct effect of WTO law therefore will not create the judicial protection for individuals in a way to give an opportunity for them to rebalance their rights that is impaired by the violation of WTO Law. The absence of domestic judicial protection will also diminish the substantive value of WTO Law where the value of WTO Law will be effectively implied if the national court can relate the individual right and WTO Law by giving direct effect.[765]

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[762]WTO Panel Report, Section 301 – 310 of US Trade Act of 1974, *WT/DS152/R*, adopted 27 January 2000, paras 7.73, 7.75 -7.

[763] See Responsibility of States for Internationally Wrongful Acts 2001, *Supra Note*83 . See Article 23 (1) DSU "When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding."

[764] See Chapter IV

[765] See Hilf, Meinhard, (1997), 'The Role of National Courts in International Trade Relations', in *International Trade Law and the GATT/WTO Dispute Settlement System*, ed. Petersmann, Ernst-Urlich, Kluwer Law International – The Netherland, pp. 559 -579. Hilf is another scholar who promotes such a reform when he

Nonetheless, the friction between WTO Law and state liability can be suppressed by looking closer to the analytic argument of reason for establishment of the WTO Agreements and the provenance of state liability principle where principally there is a nexus between WTO Law and state liability principle. The following chapter therefore analyzes the nexus between WTO Law and State Liability principle.

points out that "domestic courts would offer the best guarantee of protection of interests and rights of individual operators, thus making the entire GATT system more effective."

CHAPTER VI

THE NEXUS BETWEEN STATE LIABILITY PRINCIPLE AND THE WTO LAW

1. Background

It has been concluded in Chapter IV that in terms of the implication of WTO retaliation to private economic actors, state liability so far is not accomplished. The reason is because there is a friction between state liability principle and the WTO Law. The friction occurs due to the absence of direct effect of WTO law and DSB Decision[766], thus, private economic actors are barred to rely on WTO Law and DSB Decision to challenge the illegality of national trade policy which is violating the WTO Law.[767] In result, private economic actors cannot obtain compensation from damage caused by the violation.

As mention in Chapter III, the characteristic of state liability principle is protecting individual rights, including economic rights, from the harmful act conducted by government. And the function of state liability principle is rectifying or compensating the damage caused by the infringement of individual right.[768] Economic right known as right granted in national constitution[769], on the other side it is obligation of government.[770] It is inherently accommodating individual to pursue economic interest across frontier. In order to accommodate this right, government is obliged to provide rules and mechanism for every individual to pursue their economic interest across frontier by participating in the WTO. Since the WTO itself contains substantive and procedural rights as inherent obligation of government,[771] accordingly, when a government deviate these rules and mechanisms, it thus will directly infringe individual economic right. And when the damage occurs, it will then entail the obligation to rectify and to compensate the damage according to state liability

[766]See Chapter V

[767]See Chapter IV

[768]See perception of State Liability according to John Locke, Supra Note 330, See Chapter III

[769]Sunstein, Cass R, Supra Note 331. Macklem, Patrick, Supra Note 327

[770]Kratochwill, Friedrich V, Supra Note 244

[771]See Chapter II

principle. This argument consider as a nexus between state liability principle and WTO law. In order to elaborate the nexus, the following sub section discuss three points of arguments:

1) The WTO law consists obligation of government to provide a rule and mechanism for individual to pursue economic interest across frontiers
2) This obligation based on individual economic right pursuant to national Constitution.
3) When government deviate these rules and mechanisms, it thus will directly infringe individual's economic right, it will then entail the obligation to rectify and to compensate according to state liability principle.

2. The WTO Law Consists of the Obligation of Government to Provide A Rule and Mechanism for Individual to Pursue Economic Interest Across Frontiers.

Referring to historical background of establishment the WTO Agreements, the founding members of GATT 1947 has been concerned in regard with the necessary of fair trade among nations. In 1994 over one hundred governments took part in the Uruguay Round, defending the interest of countries of all sizes, stage of development and economic structure. All WTO Members brought their national economic interests and national trade policies into the negotiation in Marrakesh. Politically WTO remains about multilateral and bilateral trade negotiation, therefore in every WTO negotiation rounds, Members were focusing on bargaining of trade obligations among them.

From the legal perspective, refer to Panel argument in *Section 301 – 310 of US Trade Act of 1974* case, WTO does not only contains obligations of a Member to other Members, but also obligations of governments to their citizens. Panel declared that "what are the objects and purpose of the DSU, and the WTO more generally, that are relevant to a construction of Article 23? The most relevant in our view are those which relate to *the creation of market conditions conducive to individual economy activity in national and global markets* and to the provisions of a secure and predictability multilateral trading system (emphasize added)."[772] There are two layers of obligations in terms of WTO law. First is obligations among the Member States (or obligations to private economic actors in other WTO Members), and the second is obligations from a government to private economic actors (individual) within its jurisdiction. The obligation from government to its private economic actors is that the government is obliged to provide rule and mechanism conducive for private economic actors to conduct economic activity across frontier in order to pursue their economic interest.

[772]See WTO Panel Report, Section 301 – 310 of US Trade Act of 1974, *Supra Note* 762, para 7.71

Panel also declared that "It would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose on many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, it is to produce certain market conditions which would allow this individual activity to flourish."[773] Chapter II in this research however already analyzed the obligation of government to provide rule and mechanism for individual to conduct economic activity across frontier in order to gain benefit under the WTO Agreement. The rules and mechanism is provided in the array of GATT/WTO Agreements including Annex. In this term, government also needs to consider individual rights, both substantive and procedural, derive from WTO Agreements.[774]

The obligation of government to provide rule and mechanism basically derives from economic rights granted in national constitutions[775] as a legal support and protection for those individual to conduct economic activity across frontier. Without legal support and protection from their governments, including national and international legal support, these legal entities find a paucity of economic benefits. It thus will be relevant if the analyses continue to discuss that the obligation of government to provide rule and mechanism for individual to pursue economic interest across frontier is basically based on economic right pursuant to national constitution.

[773]Ibid, Para. 7.73.

[774]See Chapter II

[775]For definition of national constitution see Conant, Michael, (2009), *The Constitution and Economic Regulation: Objective Theory and Critical Commentary*, Transaction Publisher – NJ/USA, pp. 1. Basically the concept of constitution is the same in every country where constitution consist obligation of government to protect rights of individual. EU basically has created the Treaty establishing a Constitution for Europe or European Constitution. It was ungratified international treaty intended to create a consolidated constitution for the European Union. It would have replaced the existing EU Treaties with a single text, given legal force to the Charter of Fundamental Rights. In 13 December 2007, the Treaty of Lisbon was created to replace the Constitutional Treaty. It contains many of the changes that were originally placed in the Constitutional Treaty but was formulated as amendments to the existing treaties. The Treaty Lisbon entered into force on 1 December 2009. See Treaty Lisbon 2009, available at: (http://europa.eu/lisbon_treaty/full_text/).

3. **The Obligation of Government to Provide Rules and Mechanisms for Individual to Pursue Economic Interest Across Frontiers based on Economic Rights pursuant to National Constitution**

Economic rights in this context are relating to freedom to engage in economic activities. It is similar to freedom to produce and freedom to trade what they produce. In the means of production, trade and distribution, this freedom is not restricted by the states preventing from buying, selling and operating means of production. And the relation of employment is that if the people are allowed to own means of production, then potential employees are allowed vastly greater array of potential employment.[776] Accordingly, it is comprehensible if the argument begins with the main core of obligations of government to provide and to protect individual economic right derives from constitution.

Economic rights exist in almost all national constitution in different phrases, such as economic freedom[777], right to work[778], right to property[779], right to trade or to conduct business[780], intellectual property rights[781], and other right associate with economic activities[782]. All these rights are foundation for all individual to engage in any economic activities, such as activity to produce goods, to provide services, to sell and purchase goods, to distribute goods and services, and to own the property derives from any economic activities. Hence, governments are obliged to provide and to protect individual economic rights in order to guarantee all individual to pursue economic interest where all economic rights are granted in their national constitutions.

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[776]Petersmann, *Supra Note* 225, pp. 475-476. See also McCrudden, Christopher, (2004), 'Property Rights and Labor Rights Revisited: International Investment Agreements and the "Social Clause" Debate', in *The Auto Pact: Investment, Labor, and the WTO*, ed. Irish, Maureen, Kluwer Law International – the Hague/Netherlands, pp. 305.

[777]For example: Romanian Constitution Article 45, Bulgarian Constitution Article 19, Switzerland Constitution Article 27

[778]For example: Constitution of Norway Article 110, the EU Charter of Fundamental Rights Article 15, Constitution of Peru, Article 24, and Japan Constitution Article 27.

[779]For example: Japan Constitution Article 29, EU Charter of Fundamental Rights Article 14, and Argentine Constitution Section 17.

[780]For example: Commerce Clause and Contract Clause of the U.S. Constitution, EU Charter of Fundamental Rights Article 16, Argentine Constitution Section 14, and Article 19 para. (g) in The Constitution Of India 1949.

[781] For example: Article 1, Section 8, Clause 8 the U.S. Constitution,

[782]For example: Article 33 of Indonesian Constitution.

States are aware to legitimate economic interest of their citizens in the constitution. For example, the EU Charter contains few rights which can be clearly classified as modern and advanced economic rights. The right to property is another rights recognized as the right of possession.[783] Possessions are given a wide interpretation to include various assets acquired through economic activities.[784] All vested rights having an economic value are included. The right is also including the means to earn an income from business.[785] Through the protection of right to property, the EU Charter has certainly incorporated a wide range of economic activities within sphere of legal protection. The EU Charter should not be judged in isolation but be read with the European Union legal system. Within the European Union, the ECJ has held that individuals obtain rights from the treaties creating the EU which are endowed with economic rights. This right, however, relate to the establishment of a common market area.[786]

Similar to the EU, The U.S. Constitution also recognizes guarantee of individual to pursue economic interest based on economic rights.[787] Economic rights are protected by the U.S. Constitution in the power of Congress listed in Article I, Section 8 which is recognized as commerce clause. The Commerce clause is one of the most important clauses in the entire Constitution both in term of providing individual a mechanism to pursue economic interest and giving power to Congress to regulate the individual commercial activities. Article 1, Section 8, Clause 3 of the U.S. Constitution empowers Congress "to regulate commerce with foreign Nations, and among several States, and with Indian Tribes."[788] The term of commerce

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[783]Article 17 European Charter of Fundamental Rights, "Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest." available at (http://www.europarl.europa.eu/charter/pdf/text_en.pdf,) last visitedat 12 December 2011.

[784] The European Court concluded that right to property does not only protect tangible property, but also intangible property such as shareholders rights were also considered property rights. See *case Lithgow and others vs. the United Kingdom*, 8-July 1986, series A-102. See also Van Banning, Theo R.G., (2001), *the Human Right to Property*, Intersentia – Antwerp/Belgium, pp. 85-86.

[785]See Case *V.D. Mussele v. Belgium*, 23/11/1983 Series A-70, *Van Marlea.o. v. Netherlands*, 26/06/1986 series A-101, and,*H. v.s. Belgium*, 30/11/1987 series A-117-B. These cases are pertinent to the rights to an income arising from the exercise of occupation or business.

[786]Booysen, Hercules, (2007), *Principles of International Trade Law as a Monistic System*, Interlegal Publisher – South Africa, pp. 46-48.

[787]See Pennsylvania Constitution of 1776, Declaration of Rights, art. VIII, *Supra Note* 328, pp. 278.

[788]Fischel, William A., (1995), *Regulatory Takings: Law, Economics, and Politics*, the President and Fellows of Harvard Publisher – Cambridge MA/USA, pp. 113. The Commerce Clause became the constitutional vehicle by which congress could regulate almost any private activity and any level of government.

as used in the Constitution means business or commercial exchanges in any and all of its forms between citizens of different states. Interstate commerce or commerce among several states is the freedom of individual to exchange of commodities between citizens in different states across state lines. And commerce with foreign nations occurs between citizens of the U.S. and citizens subject to foreign governments. For domestic commerce or commerce within jurisdiction of one State is subject to the exclusive control of the State.[789]

The U.S. Constitution also recognizes the contract clause promulgated in Article 1, Section 10, Clause 1, where this provision protects the enforcement of contracts. Contracts must be enforceable so that property can be exchanged. Without freedom of contract and enforcement of contract by the courts, there would be little stability in financial arrangements, thus, uncertainty would discourage people from getting involved in economic life.[790]Another important economic right is the copyright clause, Article 1, Section 8, Clause 8 of the U.S. Constitution which states that Congress shall secure for limited times to authors and inventors the exclusive right to their respective writings and discoveries. These economic rights constitute fundamental right that is protected by the Fifth Amendment.[791] The U.S. Constitutions emphasizes the important of property right pertinent to the liberalization of commerce and trade. It is protected in so far as the states are prohibited from passing laws interfering with the obligation of contracts.[792]

The economic rights lay down in the constitution is a foundation for government to provide a legitimate rule and mechanism for individual to pursue economic interest across frontier. For example the regulation of market access in order to simplify access for citizen to conduct their economic activity across border. The higher level of governance provides the

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[789]See Schultz, David Andrew, (2009),*Encyclopedia of the United States Constitution*, Infobase Publisher – NY/USA, pp. 148-149.

[790] See Schug, Mark C., Caldwell, Jean, Ferrarini, Tawnilun, (2006), *Focus: Understanding Economics in the United States History*, National Council on Economic Education Publisher – USA, pp. 107-114. Other than commerce clause, the U.S Constitution promulgate the taxation clause, Article 1, Section 8 of the U.S. Constitution states that Congress shall have the power to lay and collect taxes. This power enables the federal government to use tax revenue to pay for public goods, for example providing for national defense and building roads, bridges and canals.

[791] Fifth Amendment states that no person shall be deprived of life, liberty, or property without due process of law. It also state that the government may not take private property for public uses without paying 'just compensation' to property owners. In other words, government may not arbitrarily take the property of individuals. For example it may not nationalize business or farms.

[792]Dietze, Gottfried, (1985), *America's Political Dilemma: From Limited to Unlimited Democracy*, University Press of America – Maryland/USA, pp. 66-67.

necessary discipline and guarantee in market access, for example the economic liberty which is guaranteed as fundamental rights in Swiss Federal Constitutions[793], then in the regional level, the Four Fundamental Freedom are guaranteed by the EU Law[794], and in the global level like the WTO enshrines market access right[795] for all individual from all WTO Members.

The government commitment is to preserve economic rights in the international scope by participating in international economic relation such a WTO. It has been discussed in Chapter II that the core of intensive international economic relations begins with individual economic interest. According to Voitovich, "the global economic relation derives from common economic interest of states which is influenced by individual economic interest within the country, hence, to meet this common economic interest, state construct extraterritorial economic agreements which is creating international legal rules."[796]Van Themaat also argued that "interdependency of states in economic activity is obvious to realize the objective of national economic interest, since historically at national level in the west, that is no longer possible to achieve a number of objectives of national economic policy through national means only. It is thus necessary to have international intervention in addition to international rules for liberalization and non-discriminations simply for realization of the objective of national economic interest."[797]Henceforth, the government involves setting up international economic law with other governments. International economic law therefore should meet the requirements of the infrastructure of national economic policies and national economic law,[798]where the national economic policy is genuinely representing the individual

[793]Article 27, Economic Freedom of Switzerland Constitution, para. (1) economic freedom is guaranteed, (2) In particular, it entails the free choice of profession as well as free access to and fee exercise of private economic activity. Available at:(http://www.servat.unibe.ch/icl/sz00000_.html)last visited on 6 September 2011.

[794]Market Access right for goods is promulgated in Free Movement of Goods, Articles 28 - 37 of Treaty Functioning of European Union. Available at (http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:en:PDF)

[795]WTO recognizes market access for goods that means the conditions, tariff and non-tariff measures agreed by members for the entry of specific goods into their markets. Tariff commitments for goods are set out in each member's schedule of concessions on goods. The tariff concessions in GATT 1994 are supposed to lead to better market access under the WTO. Market Access right also recognized in GATS article XVI.

[796]Voitovich, *Supra Note* 165, pp.4. According to Voitovich, international economic relations as a whole cannot be regulated in isolation by either international economic law or municipal laws. In this sphere close interrelationship between international and national laws is inevitable.

[797]Van Theemat, *Supra Note* 195, pp. 15-16.

[798]*Ibid*, pp. 16.

economic interest that could be the primary reason to commit international economic law in the sphere of development of cross border economic activity. Significantly, the motivation behind any international economic law is the intention of state to enhance its private economic actors to gain a broader benefit.[799]As Kohona argued that, "in the contemporary world, this would be a result in the development of closer relationship between international norms and domestic norms, since international economic relations tend to affect citizens. As the world becomes more economically interdependent, the citizens thus will more find greater possibility to conduct their business and to provide better income that is affecting their quality of life. The result of this, citizens of the country could be expected to assert them in more aggressive and require their government to respond their needs to a greater extent in development of international economic relations."[800] To that end, the intention of government to join the WTO is to enhance its private economic actors to gain broader benefits based on their economic rights.

3.1. The Commitment of Government's Accession to the WTO is to Guarantee Individual Economic Rights

It has been discussed in Chapter II that the key objective of WTO Law is the progressive removal of barriers that prevent or make more difficult beneficial exchange between producers and consumers located in different countries. The removal of barriers intend to enhance broad empirical support for the proposition that the WTO promotes growth, economic stability, in turn supports investment in the creation and protection economic rights for individual.[801] In fact, all Members of the WTO is voluntarily accessing and adopting

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[799]The motivation for all government to involve in the international economic law is to develop their national economic interest which is underlined inGA Res. 3281(xxix), UN GAOR, 29th Sess., Supp. No. 31 (1974) 50,*Charter of Economic Rights and Duties of States*, Article 5, "All states have the right to associate in organizations of primary commodity producers in order to develop their national economies, to achieve stable financing for their development and, in pursuance of their aims, to assist in the promotion of sustained growth of the world economy. In particular is accelerating the development of developing countries. Correspondingly, all states have the duty to respect that right by refraining from applying economic and political measures that would limit it." Available at: (http://www.un-documents.net/a29r3281.htm.)

[800]Kohona, *Supra Note* 200, pp. 5. See Love and Lattimore, *Supra Note* 143. See also Carbaugh, Robert J., (2009), *International Economics 12th edition*, South-Western Cengage Learning-Ohio/USA, pp.27 – 29. See Chapter II.

[801]Anderson and Wager, *Supra Note* 226, pp.5.Relation between economic rights and interest of private economic actors is, private economic actors are the institution representing the group of individuals in achieving their economic rights. According to international human rights law, individual has right to attain its economic rights, such as right to work, in article 23 (1) Universal Declaration on Human Rights 1948;

WTO rules base on their constitutional commitment to guarantee economic interest of their individual, so indirectly the corresponding to individual right hence exist in the coherence context between the intention of the Members to join the WTO and the obligation to guarantee individual economic interest where the guarantee is pertinent to their obligation to protect and to preserve economic rights derive from their constitutions.[802] Although in the context of WTO, the obligation is extending to other individual from other WTO Members, for example, based on principle non-discriminatory, Most Favored National Treatment and Market access, WTO Members are obliged to give the same protection to other nationals from other member, as it constitutes mutual concession treatment among the WTO Members.[803]

It must be pointed out that although WTO and GATT do not contain individual guarantee of the freedom of trade, but WTO Law contains precise rules of non-discrimination in the sense of most favored nation treatment and national treatment which is very significant to guarantee functions with regard to the safeguarding of unimpeded trade. Unlike the EU law, the WTO also does not contain economic rights and liberties which can be invoked by the individual in preference to national law, which may importantly promote and secure trade liberalization.[804]However, the economic rights and liberty derives from national law of each WTO Members become a main purpose for all individual to involve in the international trade, since the accession to WTO Agreement contains several possibilities for individuals to gain

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"everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment". And right to own property in Article 17 (1) "Everyone has the right to own property alone as well as in association with others".

[802]This argument is about placing the national constitutional commitment above political approach which is contradictory with Howse who mentioned that "constitutional is viewed as the means of placing law, or the rule of law, above politics. In short, a constitutionalism attempts to place economic freedom above politics", see Howse and Nicolaidis*Supra Note* 751. However, according to Hirschl, "most constitutional catalogues of rights place boundaries on government action and protect the private sphere (human and economic) from unjustified state intervention." See Hirschl, Ran, (2004),*TowardJuristocracy: The Origins and Consequences of the New Constitutionalism*, the President and Fellows of Harvard College Press – Harvard/USA, pp. 47 - 49.

[803] See Panitchpakdi,Suphachai, (2001), 'Balancing competing interest: The Future role of the WTO', in *The Role of the World Trade Organization in Global Governance*, ed. Samson, Gary P., United Nations University Press – Tokyo/Japan, pp.29-36. The main reason for this mutual treatment is for balancing competing interest among the WTO members.

[804]See Stoll and Schorkopf, *Supra Note* 711,pp. 36 – 38. Stoll and Schorkopf argued that "without the driving force of directly applicable individual trade rights which take priority over national law, the liberalization of trade rests entirely with the Members, which by the way, very well take on interests and complaints of individuals, and thus indirectly bring the rights and interest of individuals into play."

their economic interest.[805] In the light of it, when WTO creators negotiate the multilateral trading system, they create objective of WTO Law in accordance with economic right of individual. The government therefore relies on this objective in regard to provide rule and mechanism for individual to trade across border.

In order to support the argument above, the following sub section discusses the analytical approach of objective of the WTO and its relation to economic rights.

3.2. Correlation between the Objective of the WTO and Economic Rights.

The objective of WTO defines as "to raising standard of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of good and services",[806] elaborates the relation between the existent of right of individual to raise standard of living and full employment derives from WTO and the economic activity as an engine for such economic growth that is basically fuelled by individual activity. The success of the WTO, increasing the world's economic welfare depends to a considerable extent on individual initiatives.[807] Thus, the objective of the WTO of increasing human welfare with an open trading system that fosters employment and development at the same time requires and promotes individual freedom and economic rights. Economic rights serve trade interest because they enhance economic potential and protect economic freedoms.[808]Economic freedom in this context refers to the achievement of

[805]Comparing to the argument of Petersmann regarding the WTO constitutionalization concept when the WTO Members have no responded to the U.S. proposal for human rights approach to international trade and emphasize that the WTO rules and policies remain members driven or producer driven for benefit of powerful 'rent seeking interest group' and it would be detriment of general consumer welfare and citizen rights. However, basically, the intention of all Members to access the WTO is for the benefit of all individual within its jurisdiction and extends to other Members' individual. See Petersmann, *Supra Note* 752, pp. 475-476.

[806]The interpretation of objective of WTO Agreement refers to WTO Panel Report, Section 301 – 310 of US Trade Act of 1974, *Supra Note 762*, Section (c), para. 7.74, "… the ordinary meaning … in the light of [the treaty's] object and purpose", which is similar language in the second preambles to GATT 1947 and GATS. The TRIPS Agreement addresses even more explicitly the interests of individual operators, obligating WTO Members to protect the intellectual property rights of nationals of all other WTO Members. Creating market conditions so that the activity of economic operators can flourish is also reflected in the object of many WTO agreements.

[807] Refer to WTO Panel Report, Section 301 – 310 of US Trade Act of 1974, *Ibid*, para. 7.77. See also Van den Broek, Naboth, (2009), "Enforcing WTO Compliance through Public Opinion and Direct Effect: Two New Proposals to enhance the Compliance Perspective for Least Developed WTO Members", in *Frontiers of Economics and Globalization, Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment,* ed. Hartigan, James C. Hartigan, Emerald Group Publishing: Bingley/UK, pp. 453. See also Davies, *Supra Note* 105, pp. 31-67.

[808]See Choudhury,Barnali,Gehne, Katja, Heri, Simone, Humbert, Franziska, Kaufmann, Christine, and Schefer, Krista Nadakavukaren, (2011), 'A Call for a WTO ministerial decision on trade and human rights', in *The*

economic rights, such as right to property, right to conduct business or right to work, and intellectual property right.[809]

1) "The achievement of trade and economic endeavor should be conducted with a view to raising standards of living"

As mention before that the WTO Law is a rule and mechanism for private economic actors (individuals in general) to conduct trade across frontier that is negotiated by their governments. This trade rule and mechanism based on the intention of all WTO Members to conduct trade and economic with a view standard of living for all individual by expanding trade in goods and services and reducing barriers to trade.[810]Tariff concession and Non Trade Barriers consider as a rule that is provided for private economic actors to simplify their economic activities across border. With this rule, they are supposed to pursue economic interest while the government is supporting it by its constitutional commitment to protect right to obtain profit from economic activity as a broader concept from protection of right to property.[811]

From the national perspective, individual right to property, as a part of economic right, becomes a major intention for each nation to involve in the WTO. The establishment of

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Prospect of International Trade Regulation: From Fragmentation to Coherence, eds. Cottier, Thomas, and Delimatsis, Panagiotis, Cambridge University Press – Cambridge/UK, pp. 323 -333.

[809]For definition of economic freedom see Gwartney and and Lawson, *Supra Note* 153, pp. 5. The key ingredients of economic freedom are personal choice, voluntary exchange, freedom to compete, and protection of person and property. Institutions and Policy provide an infrastructure for voluntarily exchange and protect individual and their property from any aggressions. Government promotes economic freedom by providing a legal structure and a law enforcement system to protect the property rights and enforce contract.

[810]See the interpretation of preamble of GATT in Appellate Body Report, *EC — Bananas III (Article 21.5 — Ecuador II)WT/DS27/AB/RW2/ECU, WT/DS27/AB/RW/USA, 26 November 2008, EC — Bananas III (Article 21.5/US)*, WT/DS27/RW/USA,19 May 2008 para. 433,

[811]See argument regarding the protection of right to obtain profit from economic activity, See case *Case 4/73 Nold v. Commission (1974) ECR 491*when the court declared that Commission deprived the fundamental rights of Nold of free development of its business activity in result it jeopardized the profit from conducting business. Case *V.D. Mussele v. Belgium*, 23/11/1983 Series A-70, *Van Marlea.o.v. Netherlands*, 26/06/1986 series A-101, and *H. v. Belgium*, 30/11/1987 series A-117-B. See also opinion of Sir Gordon Slynn in Case *SA Biovilac NV v. European Econonomic Community*, *case 59/83*, judgment of the Court 6 December 1984. A.D. Slynn opined that "in regard with Community acts affecting a person's business activities and causing economic loss, such an action, if existing at all, must be within a narrow compass." Similar to it in the U.S., see *Wickard v. Filburn, 317 U.S. 111 (1942)*, when the Court upheld Congress's power under the Agricultural Adjustment Act to impose a quota on wheat grown by a single farmer primarily for personal consumption. The Court found that while personal growth and consumption of wheat might not, by itself, directly affect commerce, the cumulative impact of individual conduct, aggregated among many farmers, could affect the price and availability of wheat and, thus, interstate commerce. The quota also considers depriving the right of individual to property.

secure and stable right to property has been a key element in the rise of modern economic growth. It stands to reason that a private economic actor or individual would not have the incentive to accumulate and innovate unless they have adequate control over the return to the assets that are thereby produced or improved, and at the end individuals have right to enjoy the benefit from it.[812] In relation with the objective of the WTO, the protection of this right will elevate the full raising of standard of living when individual has right to obtain and enjoy benefit from their economic activity, without any restriction or deprivation from the national policy.[813]The objective of the WTO accommodates the promotion of rights lie exclusively in the international economic sphere, such as the rights of exporters and importers to enjoy of property and freedom of contract, non-discrimination in relation to other like industries, and freedom of movement of goods and services across border.[814]

These rights are protected by the national constitution, for example, freedom of commerce derives from the U.S. Fifth Amendment to the U.S. Bill of Rights, EU Charter recognize Article 16 (Freedom to conduct a business) and Article 17 (Right to property), Right to property in Japan Constitution Article 29, and protection on right to property in Argentine Constitution Section 17.

2) "Full employment"

Historically in 1944, the statesmen of Bretton Woods attempted to design a world economic order toward full employment and high rates of growth. This was a goal of the Bretton Woods negotiation to allow for domestic planning and full employment within each nation and to avoid the instability created by a global system driven purely by market forces, because the escalating instability of *laissez-faire* capitalism during the 1920 and the

[812]Rodrik, Dani,, (2002), 'Trade Policy Reform as Institutional Reform', in *Development, Trade, and the WTO: A Handbook Issue 1*, eds. Hoekman, Bernard M., Matto, Aaditya, and English, Philip, the World Bank – Washington DC/USA, pp. 4-5.

[813]Relevant to argument above, refer to opinion of General Advocate Alber regarding violation of fundamental right conducted by the EU Institutions when they refused to comply with DSB Decision in Hormone Case. See opinion of Advocate General Siegbert Alber *Supra Note* 742.

[814]See Hart, Michael, (2008), *From Pride to Influence: Towards a New Canadian Foreign Policy*, UCB Press – Vancouver/Canada, pp. 42. Hart pointed out that "the international rules governing allocative efficiency are predicated on the view that private markets and individual initiative are critical to growth and prosperity. Governments' development of trade and investment rules also accepts that the ability of the state to dispense distributive justice may be severely compromised if it undermines the ability of the private economy to achieve allocative efficiency. Thus the objective of WTO relate to a steady increase in the confidence of traders and investors, leading to expanding international exchange and growing individual, national and global prosperity."

destructive retreat autarky and currency blocs during the 1930s, which in turn led to extreme nationalism and to a second world war.[815] Henceforth, learning from the historical experience of protectionism and nationalism, states are more aware in progressive removal protectionism to be more liberalized in order to achieve full employment condition for individuals. Because when a nation becomes more industrialized it becomes more necessary to secure the services of suitable trained people in the factories and workshops. Such people are now able to command higher salaries and wages than was formerly possible. They pursue their governments to be more functioning to perform in the economy, as stabilizer, as a planner of public investment, as guarantor of high employment, as arena of social bargaining and as custodian of benign welfare state. To some extent, in such circumstances a country will automatically secure the development of those branches of manufactured which are best suited to its own particular situation.[816]This was a reason for governments to establish an international trade organization which has purpose in providing a wide opportunity for their individuals to expand their economic activities in order to obtain full employment result.

The WTO creator therefore created a rule and mechanism that is relating to employment. For example, the GATT has several provisions relating to employment, such as GATT Article XII: (3) para. (a) mentions that "contracting parties undertake, in carrying out their domestic policies, to pay due regard to the need for maintaining or restoring equilibrium in their balance of payments on a sound and lasting basis and to the desirability an uneconomic employment of productive resources." It is relating to domestic policies directed toward the achievement and maintenance of "full and productive employment".[817]

Employment dimension also plays a role in other WTO Agreements, for example in Agreement on Subsidies and Countervailing Measures (SCM Agreement), Article 15(4)

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[815]See Bordo, Michael D., (1993), 'The Bretton Woods International Monetary System: A Historical Overview', in*A Retrospective on the Bretton Woods System: Lessons for International Monetary System*, eds. Bordo, Michael D., and Eichengreen, Barry, University Chicago Press – Chicago/USA, pp. 1-5. The architect of Bretton Woods's system wanted a set of monetary arrangements that would combine the advantage of the classical gold standard with the advantage of floating rates i.e. independence to pursue national full employment.

[816]Kuttner, Robert, (1999), *the End of Laissez-faire: National Purpose and the Global Economy after the Cold War*, University of Pennsylvania Press – Penn/USA, pp. 3-25. According to the Keneysian theory which is qualified free traders, they considered the systemic commitment to high growth, planning and full employment necessary to make porous domestic market politically endurable. In the absence of such a global regime, nations might have to limit free movement of capital and goods in order to practice keneysian in on country.

[817]GATT Article XII: (3) para. (d), "The contracting parties recognize that, as a result of domestic policies directed towards the achievement and maintenance of full and productive employment or towards the development of economic resources …"

underlined "the examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including employment".[818]Agreement on Textiles and Clothing, Article 6 (3), also regulate a standard examination of the effect of import to be able to relate in to employment.[819] The most profound agreement regarding employment is GATS where in Article V bis: Labor Markets Integration Agreements states that WTO Agreement shall not prevent any of its Members from being a party to an agreement establishing full integration of the labor markets between or among the parties.[820] Another rule regarding employment in GATS is Annex on Movement of Natural Persons Supplying Services. This annex applies to measures affecting natural persons who are service suppliers of a Member, and natural persons of a Member who are employed by a service supplier of a member.[821]

WTO Members thus should concern to the meaning of full employment. From domestic sphere the context of full employment is pertinent to economic rights which constitutes as foundation for all individual to earn personal income derive from their economic activity. National trade policy should not deprive this right since it is essential foundation for all individual in order to gain the benefit from trade across frontier subject to WTO Law.

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[818]Agreement on Subsidies and Countervailing Measures (SCM Agreement), Article 15 (4), underlined that "The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programs." See also Appellate Body Report in Case *United States-Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea, WT/DS296/AB/R*, 27 June 2005.

[819]Agreement on Textiles and Clothing, Article 6 (3) states "In making a determination of serious damage, or actual threat thereof, as referred to in paragraph 2, the Member shall examine the effect of those imports on the state of the particular industry, as reflected in changes in such relevant economic variables as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment; none of which, either alone or combined with other factors, can necessarily give decisive guidance."

[820] GATS Article V bis: Labor Markets Integration Agreements. it is relating to GATS Article VI (6) regulate "In sectors where specific commitments regarding professional services are undertaken, each Member shall provide for adequate procedures to verify the competence of professionals of any other Member."

[821]GATS Annex on Movement of Natural Persons Supplying Services, para (1). However this rule is exempted from natural persons seeking access to the employment market of a Member, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis as underlined in para. (2).

3) "Trade security and predictability"

According to Panel Report in *Section 301 – 310 of US Trade Act of 1974 Case*, the multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly their individual operators. Hence, providing security and predictability to the multilateral trading system is another central object and purpose of the trade system which could be instrumental to achieve the broad objective of the WTO Agreements.[822] To this end, the government should take necessary measure to provide stability and predictability trade mechanism in order to protect individual economic right related to trade or business. For example, refer to statement of Argentina in the case of *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* that the government of Argentina concern to provide stability and predictability of trade mechanism which is promulgated under the Law No. 22.415 whereby importers have procedural right to challenge any duties assessed beyond the bound rate which purportedly a part of Argentine Law.[823]This procedural right derives from right to trade and to conduct business underlined in the Argentina Constitution.[824]

In this proceeding, Argentina also stated that the stability and predictability of concessions in its Schedule were supported by Section 75 paragraph 22 of the Argentine Constitution of 1994.[825] These commitments were at the top of the legal hierarchy and, therefore, took precedence over domestic legislation. Any judge in Argentina had the power to declare, at the request of an interested party, the unconstitutionality of any measure adopted in breach of rules contained in an international treaty, such as the WTO Agreement.[826]Accordingly, Argentina is a WTO Member who adopts direct effect of WTO law underlined in the constitution.

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[822]WTO Panel Report, *Section 301 – 310 of US Trade Act of 1974*, *Supra Note 762*, para. 7.75 – 7.76. See also Appellate Body report on *Japan - Taxes on Alcoholic Beverages*, *WT/DS8/AB/R,WT/DS10/AB/R* , *WT/DS11/AB/R*, 4 October 1996, see also Appellate Body Report in *India-Patent Protection for Pharmaceutical and Agricultural Chemical Products*, *WT/DS50/AB/R*, adopted in 19 December 1997, see also Panel Report of the case of *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, WT/DS56/R*, 25 November 1997, para. 6.29.

[823]See Panel Report of the case of Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, *WT/DS56/R*, 25 November 1997, para. 3.215 – 3.217.

[824]Constitution of the Argentine People, Section 14 states "All the inhabitants of the Nation are entitled to the following rights, in accordance with the laws that regulate their exercise, namely: to work and perform any lawful industry; to navigate and trade …" available at: (http://www.senado.gov.ar/) last visit 12 July 2013.

[825]*Ibid*, CHAPTER lV, Powers of Congress, Section 75, para. 22.

[826]See Panel Report of the case of *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, Supra Note 823*, para 3.214.

4. The Obligation of Government to Imply State Liability as a Result of Violation of WTO Law, based on infringement of Economic right

There are two different consequences if a national trade policy infringes trade rule and mechanism provided in the array of WTO Agreements. First, the national trade policy infringes the WTO Law which violates individual right to trade and to gain benefits under the WTO rules. Second, the national trade policy infringes the WTO law, causing the retaliation from other WTO Member where the retaliation itself at the end violates individual right to gain benefits under the WTO Law.

4.1. Infringement of Fundamental Rights in Biret Case

EU had several experiences regarding the consequence of violating WTO Agreement where this violation is deemed as infringement individual economic right. One of the examples is Biret Case. In this settled case, Biret Company claimed to have suffered damage as a consequence of EU Legislation prohibiting the importation of hormone treated meat.[827]Biret referred to the DSB Decision in Hormone Case[828] that EU ban on imports of meat and meat products from cattle treated with any of six specific hormones for growth promotion purposes was inconsistent with the provisions of the SPS Agreement, and required EU to lift the hormone ban in the absence of any scientific risk assessment of harm.[829]Biret sought damage for the EU's failure to comply with the WTO law because the EU refused to implement the DSB Decision in the Hormone Case. However, the GC rejected the claim for damage because the GC did not identify the unlawful conduct of EU. The court also denied the possibility for individuals to rely on provision of the WTO Agreements in order to establish unlawful conduct of the EU Institutions.[830] According to the court, since the EU Directive were adopted before SPS Agreement came into force, the court could not logically 'expressly refer to' or 'implement' particular obligation of the SPS Agreement. Furthermore,

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[827] Council Directive 96/22/EC of 29 April 1996, OJ 1996 L 125/3; Council Directive 88/146/EEC of 7 March 1988, OJ 1988 L. 70/16 Council Directive 81/602/EEC of 31 July 1981, OJ 1981 L 222/32

[828]*EC-Hormones case*, WT/DS26/13 and WT/DS46/13, 19 February 1997.

[829]Panel Report: EC-Hormones case (complaint by the U.S.),WT/DS26/R/USA and EC-Hormones (complaint by Canada), WT/DS48/R/CAN, 18 August 1997. Appellate Body Report: WT/DS/26/AB/R and WT/DS48/AB/R, 16 January 1998.

[830]Biret Case, *Supra Note 479*, the GC refused to review EU Legislative on hormone based on the 'nature and structure of the WTO Agreements', the reciprocal character of WTO obligations and the need to maintain the discretion enjoyed by the EU Institutions, similar to that enjoyed by bodies of the EU trading partners.

neither the existence of a DSB rulings identifying the unlawfulness of the EU measure nor the lack of its implementation in the present case were considered as possibly modifying the scope of the EU courts legality review regarding the compatibility of EU measures with the EU's WTO law obligations.[831]

In this case, Biret Company also claimed that the ban was contrary to the principle of the protection of legitimate expectations. Since they could legitimately expect that, first, the prohibition on the hormones would only be temporary, pending an appropriate scientific assessment as to whether or not they posed a risk for human health and, secondly, that the scope of the derogation provided for in Article 7 of Directive 88/146 would gradually be extended to include the categories of animals in the U.S which it had planned to import into the EU.[832] However, the GC held that the ban did not frustrate the legitimate expectation of Biret Company affected by the prohibition of the use of the hormones in question, because traders were not entitled to expect that a prohibition on administering the substances in question to animals could be based on scientific data alone. Furthermore, Biret Company did not set up its business until after the adoption and entry into force of Directive regarding hormone ban.[833]

G.A. Alber in Biret Case opined that the GC's reasoning to refuse to comply with the DSB Decision is infringing fundamental right or economic right of Biret Company. Fundamental right is affected in its core when Biret Company cannot continue their normal commercial activities because the EU has decided not to comply with a WTO law which is affecting their business.[834] Thus, it is unfair to deny a citizen a damages claim where the EU legislature (regarding the Hormone Ban), through its action, had continued to maintain a state of affairs contrary to WTO law for a period of four years after the expiry of the period allowed for implementation of the DSB recommendation, and thereby further unlawfully reduced the fundamental rights of the citizen.[835]AG Alber argued that EU Courts must not

[831]Ibid

[832]Ibid

[833]Ibid

[834] See BronckersandGoelen, *Supra Note* 692,pp. 399–418.

[835] See Opinion of AG Alber, *Supra Note* 742, para 91-92

disregard the freedom of trade and freedom to pursue economic activity that has been expressed in more recent judgment.[836]

According to AG Alber, trade in States organizes on market economy principle is conducted primarily by private individuals. In particular, provisions on SPS Measures such as those contained in the SPS Agreement are of considerable importance to citizens engaged in trade. It is apparent from the first recital in the preamble to the SPS Agreement, Article 2 (3) that the agreement is intended to prevent a disguised restriction on international trade. Restriction on trade through the adoption of SPS measures are in discrimination between domestic and imported goods and those engaged in the trade such goods. Restriction on trade therefore affects the citizen's freedom to pursue an economic activity. Meanwhile the ban of hormone constitutes a restriction to trade for Biret Company.[837]

AG Alber referred to the *Kampffmeyer* case when the Court held that the Regulation of the Council on the progressive establishment of common organization of the markets in grain was directed to ensuring appropriate support for the agricultural markets of the Member States during the transitional period and on the one hand to allow the progressive establishment of a single market by making possible the development of the free movement of goods within the EU on the other. The interest of the regulation that was intended to protect, is of a general nature not to prevent the interest of individuals which are engaged in EU trade.[838] It is similar to the rules on liberalization contains in the WTO Agreements and the provisions of the SPS Agreement that is, in fact, intended to protect individual interest.

The opinion of AG Alber is relevant to Panel report in Section 301 – 310 of US Trade Act of 1974 where "trade is conducted most often and increasingly by the private operators. It is through improved conditions for these private operators that Members benefit from WTO disciplines. *The denial of benefits to a Member which flows from a breach is often indirect and results from the impact of the breach on the market place and the activities of individuals within it* (emphasized added)."[839]

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[836]Ibid, See Case 240/83, *Procureur de la République v. Association de défense des brûleursd'huilesusagées* (ADBHU), (1985), ECR 00531.

[837]Opinion AG Alber, *Supra Note* 742, para. 117. See also Chapter II.

[838]See Joined Case 5, 7 and 13 to 24-66**,** *Firma E. Kampffmeyer and others v Commission of the EEC*, (1967), ECR 00245, pp 933 & 262

[839]See WTO Panel Report, *Section 301 – 310 of US Trade Act of 1974, Supra Note 762,* Para. 7.77

In conclusion, the hormone ban that restricts Biret Company to conduct their economic activities under the WTO Agreement is infringing the right to pursue economic activity which is granted in the EU Charter Article 16 (Freedom to conduct a business) and Article 17 (Right to property). It is also contrary to the main objective of WTO Agreement that WTO Member should support their private economic actors to pursue economic interest across frontiers with a view standard of living for all individual by expanding trade in goods and reducing barriers to trade. In this context, the ban is deemed as barrier to trade, while basically Biret Company has inviolable right to trade protection by EU Charter. Hence, since this case concerning the infringement of fundamental right, Biret Company is entitled to obtain compensation in order to rectify the damage caused by the hormone ban. Pursuant to EU Liability principle, the EU can be held liable if there is a serious breach of rule conferring rights on individual, they have acknowledged that breaches of rule conferring individual rights can constitute the basis for compensation.[840]

4.2. Infringement of Fundamental Right in FIAMM Case

In the FIAMM and Fedon case,[841] the applicants acknowledge that enforcement of punitive tariff infringed the right to property included the freedom to conduct a business embodies in Article 16 of the EU Charter, which represents a particular form of freedom of profession. The A.G. Maduro was strengthening applicants' argument by mentioned that "the damage on which they rely is unusual which it constitutes sufficiently serious harm to the attributes of the right to property, and to rule on whether that damage is special."[842] Accordingly, the damage caused by WTO retaliation constitutes infringement of economic right based on EU Charter Article 16. This infringement is supposed to lead to non-contractual liability and responsibility of EU legislative institutions.[843]

To analyses this case, it necessary refers to the substance of FIAMM claim of infringement right to property and right to pursue economic activity. According to FIAMM, the EU Institutions infringed they rights because they have to pay prohibitive customs duty on

[840] See *Schneider* Case, *Supra Note* 389. The GC acknowledges that the right to heard is infringed by the EU Institution as legal basis to compensation.

[841] See Chapter IV

[842] See Opinion of AG Maduro, *Supra Note* 509.

[843] See case *4/73 Nold v. Commission (1974) ECR 491*, *Supra Note* 392, see also Case *V.D. Mussele v. Belgium* 23/11/1983 Series A-70, *Van Marlea.o.v.Netherlands*, 26/06/1986 series A-101, and *H. v. Belgium*, 30/11/1987 series A-117-B.

their imports of batteries into the U.S. and to relocate their production facilities.[844] They challenged the provision of Banana market regulation interfered with the export operation in a manner that impaired the very substance rights, because the duty tariff hit the core of their trade activities.[845]The opinion of AG Maduro in FIAMM and Fedon Case regarding the infringement of individual rights can be divided into two coherent factors. First, the factor that the damage is unusual and special which is causing the infringement of individual rights become the main reason for FIAMM and Fedon companies to obtain compensation and the second, the retaliation of WTO caused by non-compliance of DSB decision become a supporting factor where the damage is coming from.

It thus necessary refers to the opinion of Advocate General Sig A. Trabucchi in *Nold* Case in 1974, in order to see legal reason that the prominent foundation to compensate the damage is infringement of individual rights. AG Trabucchi argued that the established right to the status of *Nold* as a direct coal wholesaler virtually on the basis that anyone has the right to carry out such an economic activity according to the principle of freedom of trade. It is not only concurrent to the spirit and to the very aims of the ECSC Treaty but much more generally, to the requirement to the modern organization of society. When *Nold* is unable to satisfy the conditions on the right of direct access to coal supplies, the EU Executive has any power to intervene in the economy which is consequently deprived of the possibility of carrying on direct trade. Hence, The ECJ needs to ensure the application of the Treaties of law which means that the Court should be particularly sensitive when dealing with problems that concern those fundamental rights forming the basis of every civil society. The respect for liberty, for property ownership, the declaration of principles of equality, of non-discrimination, of proportionality are form a part of the framework for the whole EU system that may never been deviated.[846]

The court need to consider principle *quarom cause omneiusconstitutum* (every law has been created for the sake of the men) which also proclaimed in modern constitutions, such an Article 14 of German Constitution.[847] The Court must ensure respect for these fundamental

[844]Joined Case FIAMM &Fedon, *Supra Note* 9, para.94

[845]Thies, *Supra Note* 444, (kindle) Location 4913. See also Case Cartondruck, *Supra Note* 538, Para. 89

[846]Opinion General Advocate Trabucchi in Case 4/73,*J. NoldKohlen- und Baustoffgrosshandlung v Commission of the European Communities*, (1974), in Common Market Law Review No. 2,pp.348 – 350.

[847]German Constitution Article 14 [Property, inheritance, expropriation] recognise: (1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.(2) Property entails obligations. Its use shall also serve the public good.(3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation.

right which the EU must adopt by recognizing that there are limits to the activity of organs and individuals and by, if necessary, recognizing liability. Both forms of recognition conform to the realities and to the requirements of the various forms of protection. The very important of the essential forms of recognition of fundamental rights requires that they should be invoked as a general ground by which to deny a more specific obligation or to impede the demands of social conduct which requires that everyone should accept limitations and sacrifices in exercising his rights. Indeed, the right of the individual is always also the result of limiting an aspect of liberty. Like every freedom, an individual right is not without its limits: every right must therefore be exercised in accordance with the rules which govern it. The EU order certainly cannot disregard the right of every citizen to engage in trade. The protection of the public interest, both by national legal orders and by the EU legal order, does however limit in several respects the exercise of trading activity.[848]

Base on opinion AG Maduro, Bronckers argued that "the reasons that the Court of Justice to reject such liability are not convincing. Governmental liability for special and unusual damage does not block policy choices of the EU legislator, it merely encourages the legislator to make policy choices more cautiously, and there is nothing wrong with that. One will recall that the EU attaches great importance to the rules-based trading system embodied in the WTO. When the EU occasionally deviates from these rules it is simply unjust to pass on the damage to some randomly selected European entrepreneurs. This also affects their fundamental right of freedom to conduct a business as guaranteed in the EU Charter of Fundamental Rights."[849]Thies, in this context also argued that "in the FIAMM and Fedon Case, the ECJ has not analyzed in the context whether the specific, allegedly infringed WTO law provision conferred rights or were meant to protect the interest of individual."[850] In fact, several provisions of the WTO agreements are at least in the interest of individual, since they are meant to regulate and protect individual trade activities.[851]

Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute respecting the amount of compensation, recourse may be had to the ordinary courts. Available at http://www.iuscomp.org/gla/statutes/GG.htm#14 , visited on 14/03/14.

[848]Opinion General Advocate Trabucchi*Supra Note* 846.

[849]See Bronkers and Goelen, *Supra Note* 692.

[850]Thies, *Supra Note*444 (kindle); Location 5030.

[851]See Chapter II

From the opinion of AG Trabucchi in *Nold* Case and the Opinion of AG Maduro in FIAMM and Fedon case, and argument Bronkers and Thies. There are some points can be concluded

1. In order to make a decision in regard with EU Liability, the court need to consider the fundamental right as a general ground by which to deny a more specific obligation or to impede the demands of social conduct which require that everyone should accept limitations and sacrifices in exercising his rights. The EU Legislative concerning banana regime hence lack of consideration that this legislative product will eliminate the right of trade of several economic actors.[852]
2. The EU courts need to consider that the decision of EU Institutions not to comply with the DSB Decision within the period of time was causing trade retaliation where the retaliation is absolutely depriving the right to gain trade benefits under the WTO Agreements caused to FIAMM and others companies who their products are on the list of trade retaliation invoked by the U.S.
3. The WTO retaliation with punitive tariff is of course impairing trade activity that FIAMM and other company need to deal with. The impairment of their trade activity substantively is infringing their right to conduct business. As a general principle, the essence of right to conduct business is right to obtain benefits from business activity.
4. From the WTO Agreement standpoint, the infringement of right to conduct business is substantively irrelevant with its objective that "The achievement of trade and economic endeavor should be conducted with a view to raising standards of living" for all individual of Members of the WTO. The protection of right to conduct of business will elevate the full raising of standard of living when individual can obtain and enjoy benefit from their economic activity, without any restriction or deprivation from the national policy.

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[852]See Case T-30/99**,** *Bocchi Food Trade International GmbH v Commission of the European Communities*, (2001) ECR – 947. See Joined cases C-364/95 and C-365/95, *T. Port GmbH & Co. v Hauptzollamt Hamburg-Jonas* (1998) ECR *I-01023***. See** Case T-521/93, *Atlanta AG, Atlanta Handelsgesellschaft Harder & Co. GmbH, AfrikanischeFrucht-Compagnie GmbH, CobanaBananeneinkaufsgesellschaftmbH& Co. KG, EdekaFruchtkontor GmbH, International FruchtimportGesellschaftWeichert& Co. and Pacific Fruchtkontor GmbH v Council of the European Union and Commission of the European Communities*, (1996), ECR II-01707

4.3. The absence of unconstitutional act of U.S. government in terms of the implication of WTO Retaliation in FSC/ETI Case

The implication of WTO retaliation base on FSC/ETI case has been discussed in chapter IV. There was no possibility for private economic actors to recourse to adjudication bodies in the U.S. for the damage caused by the E.U retaliation. It has been explained that the Congress pursuant to Article Section 8, Clause 3 of the U.S. Constitution and UURA Section 123 and 129, has authority to comply with the DSB Decision by introducing new legislative package in respect with the FSC/ETI policy. In this situation the USTR has conducted its function to negotiate the retaliation with EU in advance even before EU has intention to impose the punitive tariff. EU at the end delayed to impose the retaliation in order to provide ample time for the U.S. Congress to comply with the DSB Decision.

Assuming that the retaliation of FSC/ETI case will infringe the economic right of private economic actors in the U.S., one should notice that the infringement of economic right (in example property right) base on U.S. state liability principle only occurs when there is 'direct appropriation' by the government. The U.S. Supreme Court in *Knox v. Lee* and *Parker v. Davis* in respect to Legal Tender Acts declared that the lawful conduct of U.S. Congress will not consider infringement of the Fifth Amendment unless 'direct appropriation' occurs.[853]

The U.S. Supreme Court even posited that the taking clause has always never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. However, it will not constitute as infringement of individual right pursuant to the Fifth Amendment.[854] It thus will give the interpretation that the WTO retaliation will not create violation of individual right which entails obligation to compensation based on state liability principle because the punitive tariff do not consider infringement of individual right pursuant to the Fifth Amendment.

However, although the EU has waived the retaliatory tariff and the Congress has submissively changed trade policy in to conformity with the DSB decision to avoid sanction, there is still a gap between the rights of private economic actors to enhance their benefits under the WTO Agreement and the obligation of the U.S. Government to fulfill this right in order to maximize the trade benefit of their private economic actors. The major gap is that in

[853]See Legal Tender Cases, 79 U.S. 457, *Knox v. Lee and Parker v. Davis*, (1870), U.S Supreme Court

[854]Ibid

order to avoid retaliation, the Congress made effort by introducing legislative package which is inevitably consuming long length of time, it is thus resulting unpredictable trade situation among the U.S private economic actors who their products are on the list of imposition punitive tariff planned by the EU.[855]This situation is irrelevant to the objective of WTO as the Panel in several cases emphasized that WTO Members are necessary to provide security and predictability to the multilateral trading system, since the lack of security and predictability affects mostly their individual operators.[856]

4.4. Applying Indirect Effect of WTO Law in order to Accomplish State Liability Principle

The main friction between the WTO Law and state liability principle is the absence of direct-effect, however the Panel in *Section 301 – 310 of US Trade Act of 1974* case recognizes indirect-effect of WTO. Panel stated that "it may be convenient in the GATT/WTO legal order to speak not of the principle of direct effect but of the principle of indirect effect."[857] Hence, by using the concept of indirect effect, the national court can effectively grant right to individual for judicial protection which is instigating a safeguard for individuals who suffered damage from WTO retaliation. It can be concluded that although the WTO does not create direct-effect to domestic law, but in order to protect individual's substantive rights, domestic court should have discretion to interpret the substantive right derive from WTO Agreement. For example the interpretation of TRIPS Article 50,[858] when the EU Court held in *Hermes Case* that the Court has jurisdiction to interpret Article 50 of TRIPs in order to meet the needs of the courts of the EU Member States, they are called upon to apply national rules with a

[855] Van Hof, Carrie Anne, (2002), 'Avoiding A Nuclear Trade War: Strategies for Retaining Taw Incentives for U.S. Corporation in a Post-FSC World', *Vanderbilt Journal of Transnational Law*, Vol. 35, No. 4, pp. 1383. A key problem with any legislative package is time lag. Some lawmakers believe that replacement law could take more than six months. Thus, the time lag could make unpredictable trade situation for some companies which their product is subject to the retaliation's list.

[856]See case *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, *WT/DS56/R*, 25 November 1997, para. 6.29. Panel refer to the Panel Report on EEC - Import Regime for Bananas, DS/38/R, 11 February 1994, regarding to the 'unpredictable trade situation'.

[857]WTO Panel Report, *Section 301 – 310 of US Trade Act of 1974*, *Supra Note 762*, para. 7.78.

[858]Article 50 of the TRIPs Agreement provides: 1) The judicial authorities shall have the authority to order prompt and effective provisional measures: (a) to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance; (b) to preserve relevant evidence in regard to the alleged infringement. 2) The judicial authorities shall have the authority to adopt provisional measures in *auditaaltera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

view to ordering provisional measures for the protection of rights arising under EU Legislation falling within the scope of TRIPs.[859]

The question about direct application of TRIPS Agreement also exists in *Dior case*.[860]Although, the ECJ decided in this case, that TRIPS is not directly effective as a matter of EU law, but the question of direct effect must be resolved as a matter of EU Member State's law as to those areas in which the member state retains exclusive competence, because the matter is complex, so it does not enjoy exclusive competence vis-à-vis the member states in the field of IPRs. The ECJ then held in *Dior Case* that the Netherland Court would have discretion to decide whether Article 50 (6) of TRIPS Agreement, regarding provisional measures, would be directly in Dutch Law.[861] The ECJ has in effect acknowledged that the question whether TRIPS is directly effective is to be determined by each WTO Member. The Court in *Dior Case* also decided regarding the interpretation of intellectual property rights as substantive rights of individual, since TRIPS does not provide an express definition about 'intellectual property rights, instead it refers to Article 1 (2) to all categories of IPRs that are subject of Part II Section 1 through 7.[862] The ECJ has observed that TRIPS leaves the WTO Members the freedom to give such an interpretation. The Court held that " the interest which will be protected under TRIPS as intellectual property rights and the method of protection, provided always, first, that the protection is effective, particularly in preventing trade counterfeit goods and, second, that it does not lead to distortions of or impediments to International trade."[863]

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[859]See the Judgment of *Hermèsv. FHT*Case C-53/96,[1998] ECR I -3603, para. 28 -29.See also Case C-431/05 *Merck Genericos-ProdutosFarmaceuticos v. Merck Co. Inc. and Merck Sharp DohmeLda*(2007) ECR 1-7001, in Merck Case the Court enlightens direct application by declaring that "the reference from the Portuguese Supreme Court was about the effect of Article 33 of the TRIPS concerning the period of protection of patents. The Court held that the field is one in which the Community has not yet legislated and which consequently falls within the competence of the Member States, the protection of IP rights and measures taken for that purpose by the judicial authorities do not fall within the scope of Community law, so that the latter neither requires nor forbids the legal order of a Member State to accord to individual the right to rely directly on a rule laid down in the TRIPS or to oblige the courts to apply that rule of their own motion." See also Eeckhout, Piet, (2011), *EU External Relations Law (Second Edition)*, Oxford University Press – Oxford/UK, pp. 279.

[860]See Joined Cases C-300/98 and C-392/98 *Parfums Christian Dior SA and Tuk Consultancy BV*, (2000) ECR I-11307.

[861]*Ibid*, para. 49

[862] See TRIPS Agreement, Part II – Standard concerning the availability, scope and use of Intellectual Property Rights, Section 1: Copyright and Related Rights. Available at : (http://www.wto.org/english/tratop_e/trips_e/t_agm3_e.htm)

[863] See Joined Cases Parfums Christian Dior, *Supra Note* 859,para. 60.

Hence, it will not be considered imprecise if then the argument refers to argument of Bronckers regarding the indirect effect of WTO law in order to implement state liability in the EU. Bronckers analyzed the responsibility for the conviction government toward international economic law in EU. He argued that "the WTO's domestic law effect must give a place to the conviction that international economic law is to be meaningful to private parties, as well to the responsibility the EU and its institutions, they have to manage this international system sensibly in a way that takes the effects on European interests overall duly into account." Bronckers emphasized that direct effect can be more flexible instrument where international economic agreements are concerned. One important principle developed by the Court is that treaty consistent interpretation, whenever an EU measure permits several interpretations, the court feel obliged to choose the interpretation that is consistent with relevant agreement, the EU Court therefore develop technic to pay respect to international rules and rulings even without granting them direct-effect.[864]

The concept of indirect-effect of WTO Law or DSB decision is also recognized in the U.S. case law. In the case of *Allegheny Ludlum Corp vs. the U.S*[865], a case regarding countervailing duties, the court referred to *Charming Betsy* doctrine[866] when considering the effects of a DSB decision. In this case, the court had to judge on a methodology followed by Department of Commerce to calculate a countervailing duty to be applied against a subsidized company. In its judgment, the Court thus refer the *Charming Betsy* doctrine that further supports the statutory principle which threats sales of stock and sales of assets identically for the assessment of countervailing duties. In this case, disparate treatment under the same-person methodology would contravene the international obligations of the U.S., the court therefore refers to Appellate Body Report in *the U.S. – Countervailing Measures Concerning Certain Products from the EU*.[867] Consequently, where neither the statute nor the legislative history supports the same-person methodology under domestic countervailing duty law, the court finds additional support for construing the Act 19 U.S.C. § 1677(5)(F) as consistent

[864]Bronckers,*Supra Note* 749,pp. 244 - 255.

[865]*Allegheny Ludlum Corp v. U.S.*,367 F. 3d 1339 (Fed. Cir. 2004), the United States Court of Appeals, Federal Circuit, 13 May 2004.

[866]See case*Murray vs. Schooner Charming Betsy*, 2 Cranch 64, US 64, 2L.Ed. 208 (1804). See also Bradley, *Supra Note* 730, pp. 491. Charming Betsy Doctrine remain the doctrine that is used by the national court, in case a possible conflict between a domestic provision and an international obligation, the national court shall look first of all at the content of the national rule and see if there is scope for interpretative. In fact, in such a case, an unambiguous statute will definitely prevail over a conflicting international obligation.

[867]See *United States — Countervailing Measures Concerning Certain Products from the European Communities,WT/DS212/AB/R*, 9 December 2002.

with the determination of the WTO Appellate report. Although, the Court emphasize that the WTO Decision is only a guidelines, it does not bind this court in construing domestic countervailing duty law, but the court considered gave an indirect-effect to WTO decision in its judgment.

The conclusion of Chapter VI is the WTO law principally recognizes the obligation of government to protect the economic rights of private economic actors (or individual in general) in order to pursue economic interest across frontier. When government imposes trade policy which is violating WTO law, then it is consequently infringing rights of individual to obtain benefit under the WTO Rules, it thus constitutes a violation of economic rights of individual. It then will entail the obligation to rectify and to compensate according to state liability principle, where the function of state liability principle is that the government is obliged to compensate and rectify the right which is infringed caused by unconstitutional act imposed by both legislative and administrative institutions.

CHAPTER VII

CONCLUSION AND RECOMMENDATION

A. Conclusion

The main purpose of Article 22 (2) DSU is to promote compliance by the non-compliance party to the WTO dispute. The purpose is not to punish nor coerce the country at fault, but rather to enable the injured party to recover by re-levelling its trade. However, under the DSU rules, a WTO member is using a suspension of concession or other obligation (retaliation) lacks any duty to mitigate the economic or social consequences to private economic actors. Many of these actors will be innocent of any responsibility for the WTO violation that underlies the case. Nothing in the parlance of DSU refers to the consequence of implementation of Article 22 (2) to private economic actors or individual in general. It is because there is no interrelationship between private economic actors and WTO. The WTO relies on the responsibility of WTO Member to deal with the impact of trade retaliation to private economic actors. One should notice that the implementation of Article 22 (2) of DSU is temporary measure to induce the compliance of scofflaw party to the dispute. Once the injury party implies trade retaliation, the victims of retaliation are expected to persuade their government to comply with the DSB decision. However, it is somehow obliged the willingness of government from both disputant parties to negotiate the compliance with DSB decision, since the WTO trade retaliation is an intractable issue that needs to be tackled politically. In fact the negotiation consumes length of period of time which is causing injury party to impose high tariff as a form of retaliation. The imposition of high tariff is unavoidable causing the damage to domestic private economic actors.

Banana and FSC/ETI cases were example of WTO cases from where private economic actors bore the cost of trade damage caused to them due to the retaliation. It is clear that WTO retaliation likely to influence private economic actors. They are powerless to bear trade damage caused by the WTO retaliation in consequence of non-compliance of their governments to WTO rules. The damage is not only causing the downfall of benefit of trade they are expecting to gain under the WTO rules but also emerging the reluctance of private economic actors to rely on WTO Agreements.

Case study over Banana dispute is an illustration on how the EU Courts deal with the impact of non-compliance of the EU Institutions with DSB Decision. The EU Courts so far was dealing with two kinds of cases in regard with Banana dispute. First is the case concerning the direct impact of violation of WTO Agreement over Banana import. Banana suppliers and producers filed sue against EU Institutions due to the damage caused by the violation of WTO Agreements. Second is the case about the impact of WTO retaliation. Due to the non-compliance of EU to the DSB Decision in Banana case, DSB authorized the U.S. to impose retaliatory tariff to over 100 items products imported from EU. Seven companies went to GC and ECJ to file suit against EU Institutions in order to seek compensation based on Article 340 TFEU for the damage caused by the retaliation. However, the lack of direct effect of WTO Law becomes a major point for the EU Courts to dismiss the claim of compensation. FIAMM and Fedon case is one of the examples by which EU Courts referred to non-direct-effect of WTO Law in order to dismiss the claim. Because of the absence of direct-effect, the applicants could not rely on the violation of WTO Law as an unlawful conduct which is done by the EU Institutions. Hence, the AG Maduro was more focusing on the damage caused by the retaliation. Trade damage that is borne by the private economic actors substantially infringes their rights to gain trade benefits under the WTO which is directly infringing their rights to trade, rights to pursue economic interest or in general economic rights. On the other hand, economic rights is granted and protected by national constitutions where the government is obliged to preserve and to protect this right even from the mischievous of national policy. Hence, national judicial bodies need to construct a feasible system to rebalance violated right by enforcing state liability principle. As already discuss in the previous chapter that the characteristic of state liability is to protect individual rights that is infringed by the government while the judicial body has discretion power to perform the function of state liability to rectify and to compensate the damage accruing to the victim. In FIAMM and Fedon case, the state liability is not accomplished, although the main issue is the damage which is violating the right of FIAMM and Fedon companies under Article 16 and 17 of EU Charter. The Court did not evaluate the impact of trade damage accruing to them and disregard the potential of violation of their rights. It thus becomes unfortunate condition for those private economic actors. The EU Court is supposed to imply the principle of indirect-effect that has been mandated by Panel Decision in *Section 301 – 310 of US Trade Act of 1974* case. By implying indirect-effect of DSB Decision, the EU Court could be more concern on the damage accruing to the victims. Moreover, AG Maduro has explicitly referred to the claim for compensation in the context of the absence of unlawful conduct where the

assessment of the claim merely based on the damage and the impact of the damage that is considered as violation of inviolable rights underline in the EU Charter. Once again, in the ECJ proceeding, this claim is dismissed due to the absence of direct-effect of the WTO Law in EU legal system.

The U.S. also does not recognize direct-effect of WTO Law and DSB Decision as it underlines in Article 102 URAA. Private economic actors or individual are barred from stand before the U.S. Court to file suit against the U.S. Government to comply with the DSB Decision. However, when the U.S. is violating the WTO Agreements, the URAA is explicitly regulates the obligation of the U.S. legislative bodies to comply with the WTO Law and DSB Decision. In case of trade retaliation, the private economic actors are barred from file suit against the U.S. Federal Government to obtain compensation caused by the retaliation. The U.S Court can not imply state liability principle in order to award compensation to the victims, because of non-direct effect of DSB Decision. However, the mandate of Article 123 and 129 is clearly explicating that the U.S. legislative bodies is obliged to reform the law that is inconsistent with the WTO Law. Hence, when the EU initiated to impose retaliatory tariff due to the non-compliance of the U.S. with DSB Decision in FSC/ETI Case, several American private economic actors filed petition to the U.S. Congress and Senate in order to persuade them to comply with the DSB Decision. The U.S. Legislative bodies perform their function according to political accountability principle. This principle is a part of democracy principle when political leaders are obliged to answer their constituents over a particular issue. All individual has right to file petition in the scheme of political accountability principle. However, this principle is not an alternative for state liability principle, due to the different function of these two principles. Significantly, political accountability and state liability are implied in two different issues. First is the issue of compliance with the WTO Law or DSB Decision. According to political accountability principle, private economic actors have rights to persuade their government to comply with WTO Law and DSB Decision by filing a petition to legislative bodies. Second is the issue of compensation. State liability principle is eligible to apply only when damage occurs. Private economic actors have rights to file suit against their government before the domestic courts in order to rehabilitate the damage. Nevertheless, in FSC/ETI case, the U.S private economic actors could not enjoy the rights to obtain compensation due to non-direct effect of WTO Law and DSB Decision according to Article 102 of URAA

In conclusion, private economic actors both in EU and the U.S are barred from obtaining compensation for trade damage caused by WTO retaliation. The EU Courts failed to perform the function of state liability principle due to the lack of direct effect of WTO Law and DSB Decision in the EU Legal System. Meanwhile, the U.S. Court is barred to perform the function of state liability principle due to non-direct-effect of WTO Law and DSB Decision in the U.S. Legal system.

Direct-effect of WTO Law and DSB Decision is a very crucial point in this research. The willingness of WTO Members to grant direct-effect of WTO Law and DSB Decision in their legal system depends on the political point of view. The EU Courts avoid granting direct effect because according to them direct-effect will deprive the authority of EU Institutions to perform their function to negotiate international trade with other WTO counterparts. The absence of reciprocity principle among WTO Members becomes predominant reason for the EU Courts not to give direct-effect. Not all WTO Members are granting direct-effect of WTO Law and DSB Decision, it then leads to imbalance of trade amongst the WTO Members. Meanwhile, the U.S. explicitly regulates non-direct-effect of WTO Law and DSB Decision since the U.S recognizes state sovereign immunity doctrine. If direct-effect of WTO Law is granted then it will be considered as sovereignty diminution. The power of the U.S. legislative bodies will be diminished by granting individual direct-effect of WTO Law and DSB Decision. To this end, the research provides a solution for this conundrum by referring to indirect-effect principle. Indirect-effect principle is a solution where the national judicial body can perform the function of state liability by merely focusing on trade damage caused by WTO retaliation. Indirect-effect doctrine will also emanate the effectiveness of WTO Law. Domestic court should indirectly refer the real effect of WTO Law and DSB Decision on individual's life. The impact of implementation Article 22 (2) of DSU needs to be evaluated by the domestic court in order to hinder the violation of individual's right.

The WTO Agreements basically regulate trade rule and mechanism for private economic actor to conduct economic activity across frontiers. Moreover, the WTO Agreements also provide substantial and procedural rights for those economic actors in order to gain benefits under the WTO agreements. These rights on the other hand are obligation of government. The government is obliged to provide market condition conducive to private economic actors in order to obtain trade benefits under the WTO Agreements.

The trade rules and mechanism is politically negotiated by the government in every WTO negotiation rounds which is pertinent to the function of government in the WTO as policy maker. The intention of WTO Members to join the WTO is inherently derive from the

interest of national economic influenced by individual economic interest. When individual pursuit their economic interest to conduct economic activity, their activity is protected by constitution where every individual constitutionally enjoys economic rights such right to property, right to work, right to conduct business or right to trade. When the damage occurs due to the violation of WTO Agreements, state is obliged to rehabilitate the damage in order to provide a market conducive for all individual under the WTO rules.

Bearing in mind that the FIAMM case is an example such a failure to perform the function of state liability principle due to the absence of direct effect of DSB decision will create the condition which the private economic actors are hesitance to rely on the WTO Agreement to gain trade benefits across frontiers, since the absence of direct effect is an impediment of judicial protection for individuals in a way to give an opportunity to rebalance their rights that is diminished by the incompliance of DSB Decision. To avoid the failure to perform the function of state liability, judicial bodies need to consider merely on the infringement of individual rights.

B. Recommendations

To conclude this research I recommend four points of arguments

1. The WTO Adjudication bodies need to consider the social and economic impact on the implementation of Article 22 (2) DSU to the private economic actors as main player of WTO. DSB needs to recall the *raison d'etre* of establishment of WTO as international trade organization which is involving the economic interest not only country as a whole but also individual who is conducting their economic activities across frontiers.

   Prior to authorize the injured party of WTO dispute to impose trade retaliation, the DSB needs to consult the impact of trade retaliation to the economic actors within the jurisdiction in both disputant party. DSB is necessary to consider the balance between the purpose of Article 22 (2) DSU and the value of international trade underlines in the objective of WTO Agreements. It has been analyzed in chapter VI that the objective of WTO Agreements is giving wide possibility for every individual to raise standard of living from trade activity across frontiers and full employment, because when a private economic actor bears a burden from the WTO retaliation, it is impeding to achieve substantive value of objective of WTO Agreements.
2. DSB also recommended urging the disputant party to imply Article 22 (1) DSU (compensation) instead of Article 22 (2) of DSU (suspension of concession) by giving more ample time for the disputant parties to negotiate the level of compensation.

3. The judicial bodies in the domestic level are necessary to be more concern on the impact of WTO retaliation from the perspective of infringement of individual economic rights. It has been explained in the previous chapter that the judicial body has discretion to perform the function of state liability principle in order to rebalance the rights that is infringed by the national policy. In addition, by using the concept of indirect effect, the national court can effectively grant right to individual for judicial protection which is instigating a safeguard for individuals who suffered damage from WTO retaliation.
4. Although the government has wide authority to perform its function as policy maker in international trade, it will be more reliable if the government also considers the value balance between the political interest in trade national policy and the obligation to provide market condition conducive for all private economic actors to obtain benefit under the WTO Agreement. The government needs to reconsider the main purpose of accessing the WTO Agreement is to support every individual to pursue their economic interest across frontiers.

BIBLIOGRAPHY

1. LAW AND REGULATIONS

A. TREATY, CONVENTION AND INTERNATIONAL AGREEMENTS

Agreement on Agriculture, 1994, (AoA)

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)

Agreement on Subsidies and Countervailing Measures (SCM Agreement)

Agreement on Technical Barriers to Trade (TBT Agreement)

Agreement on Textile and Clothing

Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)

Agreement on Trade Related to Intellectual Property Rights (TRIPS Agreement)

Agreement on Trade Related to Investment Measures (TRIMs Agreement)

International Covenant on Economic, Social and Cultural Rights, 1966, (ICESCR)

The Charter of the United Nations, 1945, (UN Charter)

The General Agreement on Trade and Tariff (GATT)

The General Agreement on Trade in Services (GATS)

The General Agreement on Trade in Services (GATS), Annex on Financial and Annex on Telecommunications and Basic Telecommunications

The Marrakesh Agreement on Establishing of World Trade Organization, 1994, (WTO Agreements)

The Universal Declaration on Human Rights, 1948, (UDHR)

The Vienna Convention on the Law of Treaties, 1969, (Vienna Convention)

Treaty Establishing the European Coal and Steel Community, 1952, (ECSC)

Treaty Establishing the European Economic Community, 1957, (Treaty of Rome)

Treaty of Lisbon, 1999, (Treaty Reform)

Treaty on the European Union, 1993, (Maastricht Treaty)

B. NATIONAL LAW AND REGULATIONS

Basic Law for the Federal Republic of Germanty (Grundgesetz, GG), 23 May 1949

Bulgarian Constitution 12 July 1991

Constitution of Peru 31 December 1993

Japan Constitution 3 May 1947

Romanian Constitution 8 December 1991

Swiss Federal Constitution 18 April 1999

The Constitution of Argentina 22 August 1994

The Constitution of India 26 November 1949.

The Constitution of Kingdom of Norway 17 May 1814

The Constitution of Republic of Indonesia 18 August 1945

1) The United States

Bill Summary and Status 108 the Congress (2003-2004), H.R. 1769, *Job Protection Act*, The Library of Congress

Bill Summary and Status 108th Congress (2003-2004), *the Jumpstart Our Business Strengths Act (S. 1637),*The Library of Congress

Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified at 42 U.S.C. §§ 1981-1982 (1988)).

Restatement of the Law — Foreign Relations Law of the United States, Restatement (Third) of Foreign Relations Law of the United States, 1987-2011,

The Constitution of the United States, 17 September 1787, (The US Constitution)

The United States Trade Act, 1974, (The Trade Act of 1974), Pub.L. 93-618, 88 Stat. 1978, enacted January 3, 1975, codified at 19 U.S.C. ch. 12.

The Uruguay Round Agreements Act Statement of Administrative Action, 1994, (SAA)H.R. REP. NO.103-826, pt.1, at 25 (1994), as reprinted in 1994 U.S.C.C.A.N. 3773.

The Uruguay Round Agreements Act, 1994, (URAA), Pub. L. 103-465, 108 Stat. 4809, enacted 8 December 1994

2) The European Union

The Treaty on European Union (Maastricht Treaty), Maastricht, Feb. 7, 1992, 12 U.K.T.S. Cm. 2485 (1994).

The Coal and Steel Community (ECSC Treaty) Paris,Apr.18, 1951, 261 U.N.T.S. 140;

The Atomic Energy Community (EURATOM Treaty) Rome, Mar. 25, 1957, 298 U.N.T.S. 167

The European Economic Community (EEC Treaty), Rome, Mar. 25, 1957, 298 U.N.T.S 11.

Treaty of Lisbon, Official Journal of the European Union (OJ) C 306, 17.12.2007.

The Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU) , Official Journal of the European Union (OJ) C 236, Vol. 55, 26.10.2012.

EU: Regulation (EC) No 3224/94, European Union Legislation: Commission Regulation (EC) No. 3224/94 of December 1994, the implementation of the Framework Agreement on Bananas concluded as part of the Uruguay Round of multilateral trade negotiations, official Journal L 337, 24/12/1994, p.72.

Council Directive 81/602/EEC of 31 July 1981, OJ 1981 L 222/32, the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action

Council Directive 96/22/EC of 29 April 1996, OJ 1996 L 125/3; the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action

Council Directive 88/146/EEC of 7 March 1988, OJ 1988 L. 70/16 the prohibition of certain substances having a hormonal action and of any substances having a thyrostatic action

2. CASES

A. WTO CASES

Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, WT/DS56/R (WTO Panel November 25, 1997).

Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, WT/DS155/10 (WTO Arbitration August 31, 2001).

Argentina – Safeguard Measures on Imports of Footwear, WT/DS121/AB/R (WTO Appellate Body December 14, 1999).

Australia - Anti Dumping Measures on Imports of Coated Woodfree Paper Sheets (Mutually Agreed Solutions), WT/DS119/4 (WTO Dispute Settlement Body May 25, 1998).

Australia – Measures Affecting Importation of Salmon, WT/DS18/AB/R (WTO Appellate Body October 20, 1998).

Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21(5) of DSU by the United States, WT/DS126/RW (WTO Panel January 21, 2000).

Brazil - Certain Automotive Investment Measures (Request for Consultation by Japan), WT/DS51/1 (WTO Dispute Settlement Body August 6, 1996).

Brazil - Certain Measures Affecting Trade and Investment in the Automotive Sector (Request Consultation by the U.S), WT/DS52/1 (WTO Dispute Settlement Body August 14, 1996).

Brazil - Certain Measures Affecting Trade and Investment in the Automotive Sector (Request for Consultation by the EC), WT/DS81/1 (WTO Dispute Settlement Body May 20, 1997).

Brazil - Certain Measures Affecting Trade and Investment in the Automotive Sector (Request for Consultation by the U.S), WT/DS65/1 (WTO Dispute Settlement Body January 17, 1997).

Brazil – Export Financing Program for Aircraft, WT/DS46/AB/R (WTO Appellate Body August 2, 1999).

Brazil – Export Financing Program for Aircraft, WT/DS46/AB/RW (WTO Apellate Body July 21, 2000).

Brazil – Export Financing Program for Aircraft, WT/DS46/ARB (WTO Arbitration August 28, 2000).

Brazil – Export Financing Programme for Aircraft, WT/DS46/R (WTO Panel April 14, 1999).

Brazil - Measures Affecting Desiccated Coconut, WT/DS22/AB/R (WTO Appellate Body February 21, 1997).

Brazil - Measures Affecting Payment Terms for Imports (Request Consultation by EC), WT/DS116/1 (WTO Dispute Settlement Body January 13, 1998).

Canada – Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of DSU, WT/DS70/AB/RW (WTO Apellate Body July 21, 2000).

Canada – Measures Affecting the Export of Civilian Aircraft, WT/DS70/AB/R (WTO Appellate Body August 22, 1999).

Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Product, WT/DS207/AB/R (WTO Appellate Body September 23, 2002).

Chile – Taxes on Alcoholic Beverages, Arbitration under Article 21(3) (C) of DSU, WT/DS87/15 and WT/DS110/14 (WTO Arbitration May 23, 2000).

EEC-Members States' Import Regimes for Bananas , DS32/R (GATT Panel June 3, 1993).

Euroepan Communities - Mesures Affecting Imports of Wood of Conifers from Canada (Request for Consultation by Canada), WT/DS137/1 (WTO Dispute Settlement Body June 24, 1998).

European Communities – Anti – Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil, WT/DS219/AB/R (WTO Appellate Body June 22, 2003).

European Communities - Duties on Imports of Grains (Request for Consultation by the U.S.), WT/DS13/1 (WTO Dispute Settlement Body July 26, 1995).

European Communities – Measures Affecting Asbestos and Asbestos – Containing Products, WT/DS135/AB/R (WTO Appellate Body March 12, 2001).

European Communities – Measures Affecting the Importation of Certain Poultry Products, WT/DS69/AB/R (WTO Appellate Body July 13, 1998).

European Communities - Patent Protection for Pharmaceutical and Agricultural Chemical Products (Request Consultation by Canada), WT/DS153/1 (WTO Dispute Settlement Body December 7, 1998).

European Communities - Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R (WTO Appellate Body September 9, 1997).

European Communities - Restrictions on Certain Import Duties on Rice (Request for Consultation), WT/DS134/1 (WTO Dispute Settlement Body June 8, 1998).

European Communities - Trade Description of Scallops, WT/DS7/R (WTO Panel August 5, 1996).

European Communities-Antidumping Measures on Imports of Cotton-Type Bed Linen from India, WT/DS141/R (WTO Panel October 30, 2000).

European Communities--Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/R (WTO Panel September 18, 2000).

European Communities-Measures Affecting The Exportation of Processed Chese (Request for Consultation), WT/DS104/1 (WTO Dispute Settlement Body October 13, 1997).

European Communities-Measures Concerning Meat and Meat Products (Hormones) - Original Complaint by the United States - Recourse to Arbitration by the European Communities under Article 22 (6) of the DSU (12 July 1999).

European Communities-Regime for the Importation, Sale and Distribution of Banana (EC-Banana), Recourse by the United States to Article 22 (2) (14 January 1999).

European Community – Regime for the Importation, Sale and Distribution of Bananas; Recourse by the United States to Article 22 (2) of DSU, WT/DS27/43 (WTO Appellate Body January 14, 1999).

Greece - Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs (Request for Consultations by the U.S), WT/DS125/1 (WTO Dispute Settlement Body May 7, 1998).

Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico, WT/DS156/R (WTO Panel October 24, 2000).

India - Measures Affecting Customs Duties (Request for Consultation by EC), WT/DS150/1 (WTO Dispute Settlement Body November 3, 1998).

India – Measures Affecting the Automotive Sector, WT/DS146/R and WT/DS175/R (WTO Panel December 21, 2001).

India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90/AB/R (WTO Appellate Body August 23, 1999).

Indonesia – Certain Measures Affecting the Automobile Industry, Recourse to Arbitration Under Article 21(3) (C) of DSU, WT/DS54/15, WT/DS55/14, WT/DS59/13 and WT/DS64/12 (WTO Arbitration December 7, 1998).

Japan – Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R (WTO Panel April 22, 1998).

Japan - Measures Affecting the Purchase of Telecommunications Equipment (Request for Consultation by EC), WT/DS15/1 (WTO Dispute Settlement Body August 25, 1995).

Japan - Measures Concerning Sound Recordings (Mutually Agree Solutions), WT/DS28/4 (WTO Dispute Settlement Body February 5, 1997).

Japan - Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (WTO Appellate Body October 4, 1996).

Korea -- Anti-Dumping Duties on Imports of Certain Paper from Korea , WT/DS312/R (WTO Panel November 28, 2005).

Korea - Measures Concerning Bottled Water (Mutually Agreed Solution), WT/DS20/6 (WTO Dispute Settlement Body May 6, 1996).

Korea - Measures Concerning Inspection of Agricultural Products (Request for Consultation by the U.S.), WT/DS41/1 (WTO Dispute Settlement Body May 31, 1996).

Korea - Measures Concerning the Shelf-Life of Products (Notification of Mutually Agreed Solution by Korea), WT/DS5/Add 6 (WTO Dispute Settlement Body September 20, 1996).

Korea - Measures Concerning the Testing and Inspection of Agricultural Products (Request for Consultation by the U.S), WT/DS3/1 (WTO Dispute Settlement Body April 6, 1995).

Malaysia - Prohibition of Imports of Polyethylene Polypropylene (Request Consultation by Singapore), WT/DS1/1 (WTO Dispute Settlement Body January 1, 1995).

Mexico – Anti – Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of DSU by the United Stated, WT/DS132/AB/R (WTO Appellate Body October 22, 2001).

Mexico - Customs Valuation of Imports (Request for Consultation by EC), WT/DS53/1 (WTO Dispute Settlement Body September 9, 1996).

New Europe Consulting and Brown v Commission, T-231/97 (European Court First Instance July 9, 1999).

Pakistan - Export Measures Affecting Hides and Skins (Request for Consultation by the European Communities), WT/DS107/1 (WTO Dispute Settlement Body November 20, 1997).

Poland - Import Regime for Automobiles (Mutually Agree Solution), WT/DS19/2 (WTO Dispute Settlement Body September 11, 1996).

South Africa - Anti Dumping Duties on Certain Pharmaceutica Products from India (Request for Consultation by India), WT/DS/168/1 (WTO Dispute Settlement Body April 13, 1999).

Thailand – Anti – Dumping Duties on Angles Shapes and Sections of Iron or Non- Alloy Steel and H-Beams from Poland, WT/DS122/AB/R (WTO Appellate Body March 12, 2001).

the Appellate Body report on United States - Tax Treatment for "Foreign Sales Corporations": Second Recourse to Article 21.5 of the DSU by the European Communities, WT/DS108/AB/RW2 (WTO Appellate Body February 13, 2006).

the Korea – Taxes on Alcoholic Beverages , WT/DS75/AB/R and WT/DS84/AB/R (WTO Appellate Body January 18, 1999).

The United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan, WT/DS184/AB/R (WTO Arbitration June 24, 2001).

the United States – Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/AB/R and WT/DS234/AB/R (WTO Appellate Body January 16, 2003).

The United States - Imposition of Import Duties on Automobiles from Japan under Section 301 and 304 of the Trade Act of 1974 (Request for Consultation by Japan), WT/DS6/1 (WTO Dispute Settlement Body May 22, 1995).

The United States – Section 110(5) of the US Copyright Act, Recourse to Arbitration under Article 25 of DSU, Award of the Arbitrators, WT/DS160/ARB25/1 (WTO Arbitration November 9, 2001).

The United States – Standards for Reformulated and Conventional Gasoline, WT/DS2/9/AB/R (WTO Appellate Body May 20, 1996).

The United States – Tax Treatment For “Foreign Sales Corporations” , Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, WT/DS108/ARB (WTO Arbitration August 30, 2002).

The United States-Anti-Dumping Act of 1916, WT/DS136/R and WT/DS162/AB/R (WTO Appellate Body August 28, 2000).

Turkey - Anti-Dumping Duty on Steel and Iron Pipe Fittings (Request Consultation by Brazil), WT/DS208/1 (WTO Dispute Settlement Body October 12, 2000).

Turkey-Restrictions on Imports of Textile and Clothing Products, WT/DS34/R (WTO Panel May 31, 1999).

United States – Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/14 and WT/DS234/22 (WTO Arbitration June 13, 2003).

United States - Continued Suspension of Obligations in the EC - Hormones Dispute , WT/DS320/AB/R (WTO Appellate Body October 16, 2008).

United States - Countervailing Duties on Certain Corrosion - Resistant Carbon Steel Flat Products from Germany, WT/DS213/AB/R (WTO Appellate Body November 28, 2002).

United States — Equalizing Excise Tax Imposed by Florida on Processed Orange and Grapefruit Products, WT/DS250/3 (WTO Panel June 2, 2004).

United States – Import Measures on Certain Products from the European Communities, WT/DS165/AB/R (WTO Appellate Body December 11, 2000).

United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R (WTO Appellate Body May 10, 2000).

United States - Measures Affecting Imports of Poultry Products (Request for Consultation by EC), WT/DS100/1 (WTO Dispute Settlement Body August 25, 1997).

United States - Measures Affecting Textiles and Apparel Products (Mutually Agreed Solutions), WT/DS85/2 (WTO Dispute Settlement Body February 11, 1998).

United States - Measures Affecting Textiles and Apparel Products (II) (Mutually Agreed Solutions), WT/DS151/6) (WTO Dispute Settlement Body July 31, 2000).

United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear, WT/DS24/AB/R (WTO Appellate Body February 2, 1997).

United States – Section 211 Omnibus Appropriations Act of 1998, WT/DS176/AB/R (WTO Appellate Body January 2, 2002).

United States - Tariff Rate Quota for Imports of Groundnuts (Request for Consultation by Argentina), WT/DS111/1 (WTO Dispute Settlement Body January 8, 1998).

United States – Tax Treatment for "Foreign Sales Corporations", WT/DS108/R (WTO Panel March 20, 2000).

United States — Tax Treatment for “Foreign Sales Corporations,” Recourse to Article 21.5 of DSU by the European Communities, WT/DS108/RW (WTO Panel August 20, 2001).

United States--Import Prohibitions of Certain Shrimp and Shrimp Products, WT/DS58/R (WTO Panel May 15, 1998).

United States--Imposition of Countervailing Duties on Certain Hot-Rolled lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WT/DS138/AB/R (WTO Appellate Body May 10, 2000).

United States-Section 110(5) of the U.S. Copyright Act, WT/DS160/R (WTO Panel June 15, 2000).

Venezuela - Anti-Dumping Investigation in Respect of Imports of Certain Oil Coutry Tubular Goods (OCTG) (Request for Consultations by Mexico), WT/DS23/1 (WTO Dispute Settlement Body January 4, 1996).

B. PERMANENT COURT OF JUSTICE CASES

Case concerning certain German interests in Polish Upper Silesia (The Merits), Seri A, No. 7 (Permanent Court of International Justice May 25, 1925).

Case Concerning the Factory at Chorzow (Poland V. Germany), Serv.A No 17 (Permanent Court of Justice September 13, 1928).

C. ARBITRATION

International Thunderbird Gaming Cooperation (claimant) and the United Mexican States (respondent), Arbitral Award (The Arbitral Tribunal constituted under Chapter Eleven of the North American Free Trade Agreement January 26, 2006).

D. NATIONAL COURT

1) The United States of America

Alexander Chisholm, Executors v. Georgia, 2 U.S. 2 Dall. 419 419 (1793) (U.S. Supreme Court 1793).

Allegheny Ludlum Corp v. U.S, 406 U.S. 742 (92 S.Ct. 1941, 32 L.Ed.2d 453) (U.S. Supreme Court June 7, 1972).

Bank of the United States v. Deveaux, 9. U.S. (5 Cranch) 61, 91 (1809) (U.S. Supreme Court March 15, 1809).

Canadian Lumber Trade Alliance v. U.S, 425 F. Supp. 2d 1321. 28 (United States Court of Appeals for the Federal Circuit, February 25, 2008).

Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (the U.S. Supreme Court June 25, 1984).

College Savings Bank v. Florida Prepaid Postsecondary Educ. Expenses Bd, 527 U.S. 666 (1999) (U.S. Supreme Court June 23, 1999).

Ex Parte Young Case, 209 U.S. 123 (1908) (U.S. Supreme Court March 8, 1908).

Green v. Biddle, 21 U.S. 1 (U.S. Supreme Court March 5, 1821).

Gunter v. Atl. Coast Line R.R. Co, 200 U.S. 273 (1906) (U.S. Supreme Court January 15, 1906).

Hale v. Henkel, 201 U.S. 43 (1906) (U.S. Supreme Court March 12, 1906).

Hans v. Louisiana case, 134 U.S. 1 (1890) (U.S. Supreme Court March 3, 1890).

Jacobs v. United States, 290 U.S. 13 (1933) (U.S. Supreme Court October 13, 1933).

Legal Tender Cases, 79 U.S. 457, *Knox v. Lee and Parker v. Davis*, (1870), (U.S Supreme Court December, 1870).

Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed 937 (U.S. Supreme Court April 17, 1905).

Minneapolis & S.L.R Co. V. Beckwith, 129 U.S. 26 (1889) (U.S. Supreme Court January 7, 1889).

Murray v. Charming Betsy, 6 U.S. 64, 2 L. Ed. 208, 1804 WL 1103 (1804) (U.S. Supreme Sourt February 22, 1804).

Noble v. Union River Logging R.R, 147 U.S. 165 (1893) (U.S. Supreme Court January 9, 1893).

Owen v. City of Independence, 445 U.S. 622 (1980) (U.S. Supreme Court April 16, 1980).

Pam S.p.A. v. U.S. Dept. of Commerce, 265 F. Supp. 2d 1362 (U.S. Court of International Trade May 8, 2003).

Parden v. Terminal R. Co, 377 U.S. 184 (1964) (U.S. Supreme Court May 18, 1984).

Santa Clara County v. Southern Pac. R. Co, 118 U.S. 394 (U.S. Supreme Court May 10, 1886).

Sokaogon Chippewa Community v. Babbitt, 95-C-659-C, 929 F. Supp. 1165, (United States District Court, W.D. Wisconsin 1996).

Schillinger v. United States, 155 U.S. 163 (U.S. Supreme Court November 19, 1894).

SNR Roulements ; SKF USA Inc., SKF France S.A. and Sarma, 118 F. Supp. 2d 1333 (2000) (United States Court of International Trade October 13, 2000).

Timken Co. v. U.S., 788 F.Supp. 1221 (1992) (United States Court of International Trade March 12, 1992).

United States v. Lee , 106 U.S.196 (1882) (U.S. Supreme Court December 4, 1882).

United States v. Morton Salt Co., 338 U.S. 632 (1950) (U.S. Supreme Court February 6, 1950).

Wickard v. Filburn, 317 U.S. 111 (1942) (U.S. Supreme Court November 9, 1942).

2) The European Union

A. Racke GmbH & Co. v Hauptzollamt Mainz, C-162/96, (European Court of Justice 16 June 1998)

ADT Projekt Gesellschaft der Arbeitsgemeinschaft Deutscher v. Commission, T-145/98 (European Court First Instance February 24, 2000).

AFCon Management Consultants and Others v Commission, T-160/03 (European Court First Instance March 17, 2005).

Agraz and others v. Commission, T-285/03 (European Court First Instance November 28, 2008).

Alessandrini and Others v. Commission , C-295/03 (European Court of Justice June 30, 2005).

Alfredo Grifoni v European Atomic Energy Community, C-308/87 (European Court of Justice February 3, 1994).

Andrea Francovich and Danila Bonifaci and Others v. Italy Republic, C-6/90 & C-9/90 (Court of Justice November 19, 1991).

Atlanta AG, Atlanta Handelsgesellschaft Harder & Co. GmbH, AfrikanischeFrucht-Compagnie GmbH, CobanaBananeneinkaufsgesellschaftmbH& Co. KG, EdekaFruchtkontor GmbH, International FruchtimportGesellschaftWeichert& Co. and Pacific Fruchtkontor GmbH v Council of the European Union and Commission of the European Communities, T-521/93 (Court First Instance 11 December 1996)

Biret International SA and Etablissements Biret et Cie. SA v. Council of the European Union, C-93/02 and C-94/02 (European Court of Justice Opinion of Advocate General Siegbert Alber May 15, 2003).

Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG and others v Council and Commission, Joined cases 83 and 94/76, 4, 15 and 40/77 (European Court of Justice May 25, 1978).

Beamglow Ltd v. European Parliament, Council and Commission,, T-383/00 (Court of First Instance December 14, 2005).

Bocchi Food Trade International GmbH v Commission of the European Communities, T-30/99 (Court First Instance 20 March 2001)

Brasserie du Pêcheur SA v. Bundesrepublik Deutschland, C-46/93 and C-48/93 (European Court of Justice March 5, 1995).

Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v. Secretary of State for Trade and Industry , C-173/99 (European Court of Justice June 26, 2001).

CD Cartondruck AG v. Council and Commission , T-320/00 (Court of First Instance December 14, 2005).

Chiquita Brands International, Inc. and Others v. Commission, T-19/01 (European Court First Instance February 3, 2005).

Commission of the European Communities v Ireland,C-459/03 (European Court of Justice 30 May 2006)

Compagnie d'approvisionnement, de transport et de crédit SA and Grands Moulins de Paris SA v Commission, C- 9 and 11-71 (European Court of Justice June 13, 1972).

Comptoir National Technique Agricole (CNTA) SA vs. Commission of EU, C-74/74 (European Court of Justice June 15, 1976).

Costa v. Enel , C-6/64 (European Court of Justice July 15, 1964).

Denkavit Futtermittel GmbH v. Finanzamt Warendorf, C-139/77 (European Court of Justice June 13, 1978).

Deutsche Shell AG v Hauptzollamt Hamburg-Harburg, C-188/91(European Court of Justice 21 January 1993)

Dorsch Consult v. Council and Commission, C-237/98 P (European Court of Justice June 15, 2000).

Dumortier Frères SA and Others v. Council of EC, C-64 and 113/76, 167 and 239/78, 27, 28 and 45/79 (European Court of Justice May 19, 1982).

Établissements Biret et Cie SA, C-94/02 (European Court of Justice September 30, 2003).

Fabbrica Italiana Accumulatori Motocarri Montecchio SpA (FIAMM) and Others v. Council and Commission and Giorgio Fedon & Figli SpA and Others v. Concil and Commission , C-120/06 P & 121/06 P (Joined Case) (European Court of Justice (Opinion of Advocate General Poiares Maduro) February 20, 2008).

Fabbrica Italiana Accumulatori Motocarri Montecchio Spa (FIAMM) v. Council of the European Union, T-69/00 (European Court First Instance December 14, 2005).

Fedon & Figli and Others v Council and Commission, T-135/01 (2005) (European Court First Instance December 14, 2005)

Fédération de l´industrie de l´huilerie de la CEE (Fediol) v Commission of the European Communities, C 70/87 (European Court of Justice June 22, 1989).

FIAMM v. Council and Commission, T-69/00 (Court of First Instance December 14, 2005).

G. R. Amylum NV and Tunnel Refineries Limited v Council and Commission of the European Communities, C-116 and 124/77 (European Court of Justice December 5, 1979).

Georgio Fedon & Figli v. Council and Commission, T-135/01 (Court First Instance December 14, 2005).

Groupe Fremaux SA v. Council and Commission, T-301/00 (Court of First Instance December 14, 2005).

H. v. Belgium, 8950/80 (European Court of Human Rights November 30, 1987).

Hermès v. FHT Case, C-53/96 (European Court of Justice June 16, 1998).

Ikea Wholesale Ltd v Commissioners of Customs & Excise, C-351/04 (European Court of Justice December 27, 2007).

International Fruit Company NV and others v Produktschap voor Groenten en Fruit, C-21, 24 - 72 (European Court of Justice December 12, 1972).

Ireks-Arkady v. Council and Commission, C-238/78 (European Court of Justice October 4, 1979).

J. M. Mulder and others and Otto Heinemann v Council of the European Communities and Commission of the European Communities, C-104/89 and C-37/90 (European Court of Justice May 19, 1992).

Jean-E. Humblet v Belgian State, C-6/60 (European Court of Justice December 16, 1960).

Joined Case, Fabbrica Italiana Accumulatori Motocarri Montecchio SpA (FIAMM) and Others v. Council and Commission and Giorgio Fedon & Figli SpA and Others v. Council and Commission, C-120/06P and 121/06P (The European Court of Justice September 9, 2008).

Joined Cases Parfums Christian Dior SA v. Tuk Consultancy BV and, Assco Gerüste GmbH, Rob van Dijk v. Wilhelm Layher GmbH & Co KG, Layher BV, JOINED CASES C-300/98 AND C-392/98 (European Court of Justice December 14, 2000).

Julius Kind v. European Economic Community, C-106/81 (European Court of Justice September 15, 1982).

Kampffmeyer and others v. Commission, 5, 7, 13 - 24/66 (European Court of Justice July 14, 1967).

Kampffmeyer and others v. Commission, Joined cases 5, 7 and 13 to 24-66 (European Court of Justice July 14, 1967).

Laboratoire du Bain v. Council and Commission , T-151/00 (Court of First Instance December 14, 2005).

Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v Commission of the European Communities, C-352/98 P (European Court of Justice July 4, 2000).

Les Verts v. European Parliament, C-294/83 (European Court of Justice April 23, 1986).

Lithgow and others vs. the United Kingdom, A 102 (July 8, 1986).

Marshall v. Southampton Health Authority No.2 , C-271/91 (European Court of Justice August 2, 1993).

Merck Genericos-Produtos Farmaceuticos v. Merck Co. Inc. and Merck Sharp Dohme Lda, C-431/05 (European Court of Justice September 11, 2007).

Meryem Demirel v Stadt Schwäbisch Gmünd, 12/86 (European Court of Justice 30 September 1987)

Nakajima All Precision Co. v. Council of the European Communities, C-69/89 (European Court of Justice May 7, 1991).

Nederlandse Vereniging voor de Fruit- en Groentenimporthandel v Commission, C-71/74 R and RR (October 25, 1974).

New Europe Consulting and Brown v Commission, T-231/97 (European Court First Instance July 9, 1999).

Nold v. Commission , C-4/73 (European Court of Justice June 14, 1974).

NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration, C 26/62 (European Court of Justice February 5, 1963).

Parfums Christian Dior SA and Tuk Consultancy BV, C-300/98 and C-392/98 (European Court of Justice December 14, 2000).

Parti écologiste ‘les verts’ v. European Parliament, 294/83 (European Court of Justice April 23, 1986).

Pfizer Animal Health v Council (European Court First Instance September 11, 2002).

Portugal v. Council, C-149/96 (European Court of Justice November 23, 1999).

Procurer de la République v ABDHU , C 240/83 (European Court of Justice February 7, 1985).

R & V *Haegeman v Belgian State,* 181/73 (European Court of Justice 30 April 1974)

Royal Scholten-Honig v. Intervention Board for Agricultural Produce, C-103 and 145/77. (European Court of Justice October 25, 1978).

S. Z. Sevince v Staatssecretaris van Justitie, C-192/89 (European Court of Justice 20 September 1990)

SA Biovilac NV v European Economic Community, C-59/83 (European Court of Justice December 6, 1984).

Schneider Electric SA v Commission of the European Communities, T-310/01 (European Court First Instance October 22, 2002).

Schräder HS Kraftfutter v. Federal Rep. of Germany v.Council, C-265/87 (European Court of Justice July 11, 1989).

Sermide v. Cassa Conguaglio Zucchero and Others, C-106/83 (European Court of Justice December 13, 1984).

T. Port GmbH & Co. v Hauptzollamt Hamburg-Jonas, Joined cases C-364/95 and C-365/95 (European Court of Justice 10 March 1998)

The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport, C-344/04 (European Court of Justice January 10, 2006)

Union Nationale des Coopératives Agricoles de Céréales and Others v. Commission and Council, C-95 & 98/74, C-15 & 100/75 (December 10, 1975).

Van Der Mussele v. Belgium, 8919/80 (European Court of Human Rights November 23, 1983).

Van Gend & Loos v. Nederlandse Administratie der Belastingen, C-26/63 (1963) (European Court of Justice February 5, 1963).

Van Marlea.o. v. Netherlands, 8685/79 (European Court of Human Rights June 26, 1986).

Van Parys v BelgischeInterventie- en Restitutiebureau, C-377/02 (European Court of Justice March 1, 2005).

W.Ferrario and Others v. Commission of the European Communities, 152, 158, 162, 166, 170, 173, 175, 177, 178, 179, 182 and 186/81. (European Court of Justice July 14, 1983).

Zuckerfabrik Schöppenstedt v. Council (European Court of Justice December 2, 1971).

3. LITERATURE

A. BOOK

Abbot, K. W. (1996). Defensive Unfairness : The Normative Structure of Section 301. In J. N. Bhagwati, & R. E. Hudec, *Fair Trade and Harmonization, Prerequisite for Free Trade?* (p. 38). Massachusetts: Massachusetts Institute of Technology Press.

Ahearn, R. J. (2005). *European Trade Retaliation: The FSC-ETI Case.* Washington DC: The U.S. Congress.

Ala'i, P. (2010). From the Periphery to the Centre? The Evolving WTO Jurisprudence on Transparency and Good Governance. In D. P. Steger, *Redesigning the World Trade Organization for the Twenty-First Century* (pp. 170-173). Ontario: Wilfrid Laurier University Press.

Alemmano, A. (2008). Private Parties and WTO Dispute Settlement System, Who Bears the Costs of Non-Compliance and Why Private Parties Should Not Bear Them. In J. Chaisse, & T. Balmelli (Red.), *Essays on the Future of the World Trade Organization; Vol. II, The WTO Judicial System: Contributions and Challenges* (p. 37). Geneva: Interuniversitaires.

Alikhan, S. (2000). *Socio-Economic Benefits of Intellectual Property Protection in Developing Countries.* Geneve: the World Intellectual Property Organization (WIPO) Publications.

Alston, J., Summer, D., & H., B. (2007). *Impacts of Reductions in US Cotton Subsidies on West African Cotton Producers.* Boston: Oxfam America Press.

Altvater, E. (1993). *The Future of the Market: An Essay on the Regulation of Money and Nature After the Collapse of "Actually Existing Socialism"*. London: Verso Books.

Amani, B. (2009). *State Agency and the Patenting of Life in International Law: Merchants and Missionaries in a Global Society.* Farnham: Ashgate Publisher.

Amerasinghe, C. F. (2009). *Jurisdiction of Specific International Tribunals.* Leiden: Martinus Nijhoff Publisher.

Andreassen, B.-A. (1999). Article 22. In G. Alfredsson, & A. Eide, *The Universal Declaration of Human Rights : A Common Standard of Achievement* (p. 477). Leiden: Martinus Nijhoff Publisher.

Arnold, R. A. (2008). *Macroeconomics 8th Edition.* Ohio: Thomson South-Western Cengage Publisher.

Auburn, Jonathan, Moffet, Jonathan and Sharland, Andrew, (2013), *Judicial Review: Principles and Procedures*,(p.20-24). Oxford: University Press.

Babu, R. R. (2012). *Remedies under the WTO Legal System.* Leiden: Martinus Nijhoff Publisher.

Bank, T. W. (2008). *World Development Indicators.* Washington: The World Bank Publications.

Bartels, L. (2009). Trade and Human Rights. In D. M. Bethlehem, *the Oxford Handbook of International Trade Law* (p. 572). Oxford: Oxford University Press.

Beaulieu, E. (2007). Trade in Service. In W. A. Kerr, & J. D. Gaisford, *Handbook on International Trade Policy* (p. 157). London: Edward Elgar Publisher.

Berry, Elspeth, Homewood, Matthew J, and Bogusz, Barbara, (2013), *EU Law: Case, Text and Materials* (p.264), Oxford: Oxford University Press.

Betlem, G. (2011). Francovich Liability for Breach of European Union. In M. Andenas, & C. B. Andersen, *Theory of Practice of Harmonization* (p. 134). Glos: Edwar Elgar Publishing.

Biadgleng, E. T. (2008). The Development Balance of the TRIPS Agreement and Enforcement of Intellectual Property Rights. In J. Malbon, & C. Lawson, *Interpreting and Implementing the TRIPS Agreement Is It Fair?* (p. 120). Glos: Edward Elgar Publisher.

Biavati, P. (2011). *European Civil Procedure.* the Hague: Kluwer Law International.

Blackstone, W. (. (2007). Commentaries on the Laws of England in Four Books. In W. D. Lewis (Red.), *Commentaries on the Laws of England in Four Books, Vol. 1* (p. 233). New Jersey: the Lawbook Exchange.

Bondi, A., & Farley, M. (2009). *the Right to Damages in European Law.* the Hague: Kluwer Law International.

Bondi, A., & Farley, M. (2009). *The Right to Damages in European Law: Kluwer European Law Collection 5.* the Hague: Kluwer Law International Publisher.

Booysen, H. (2007). *Principles of International Trade Law as a Monistic System.* Pretoria: Interlegal Publishing.

Bordo, M. (1993). The Bretton Woods International Monetary System: A Historical Overview. In M. D. Bordo, & B. Eichengreen (Red.), *A Restrospective on the Bretton Woods System: Lessons for International Monetary System* (pp. 1-5). Chicago: University Chicago Press.

Bourgeois, J. (2005). *Trade Law Experience: Pottering about in the GATT and WTO.* London: Cameron May Publisher.

Bourgois, J. (1996). the Uruguay Round of GATT: Some General Comments from an EC standpoint. In N. Emilou, & D. O'Keefe, *the European Union and World Trade Law after the GATT Uruguay Round* (pp. 86-90). New York: John Wiley & Sons.

Braga, C. A., Fink, C., & Sepulveda, C. P. (2000). *Intellectual Property Rights and Economic Development.* Washington DC: The World Bank.

Brief, F. T. (2008). *Trade Barriers Faced by Developing Countries' Exporters of Tropical and Diversification Products, ICTSD and FAO Report.* FAO.

Bronckers, M. (2011). The Domestic Law Effect of the WTO in the EU – a Dialogue with Jacques Bourgeois'. In I. Govaere, R. Quick, & M. Bronckers, *Trade and Competition Law in the EU and Beyond* (pp. 240-256). Glos: Edwar Elgar Publishing.

Bronckers, M., & Van den Broek, N. (2006). Financial Compensation in the WTO: Improving Remedies in WTO Dispute Settlement. In D. Georgiev, & K. Van der Borght, *Reform and Development of the WTO Dispute Settlement System* (p. 43). London: Cameron May.

Broom, H. (1845). *A Selection of Legal Maxims: Classified and Illustrated.* Philadelphia: T & J.W. Johnson Bookseller Publishing.

Brownlie, I. (2004). State Responsibility and the International Court of Justice. In G. Fitzmaurice, & D. Sarooshi, *Issues of State Responsibility before International Judicial Institutions* (pp. 11-18). Oxford: Hart Publishing.

Carbaugh, R. J. (2009). *International Economics 12th edition.* Ohio: South-Western Cengage Learning.

Carozza, P. (2004). The Member States. In S. Peers, & A. Wards, *The EU Charter of Fundamental Rights: Politic, Law and Policy: Essay in European Law* (p. 54). Oxford: Hart Publisher.

Cass, D. Z. (2003). China and the 'Constitutionalization' of International Trade Law. In D. Z. Cass, B. G. Williams, & G. Barkers, *China and the World Trading System: Entering the New Millennium* (p. 50). Cambridge: Cambridge University Press.

Cass, D. Z. (2005). *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System.* Oxford: Oxford University Press.

Chalmers, D., Davies, G., & Monti, G. (2010). *European Union Law: Cases and Materials* (2nd ed.). Cambridge: Cambridge University Press.

Chalmers, D., Hadjiemmanuil, C., & Monti, G. a. (2007). *European Union Law.* Cambridge: Cambridge University Press.

Chayes, A., & Chayes, A. (1998). *the New Sovereignty: Compliance with International Regulatory Agreements.* Cambridge MA: Harvard University Press.

Cho, S. (2003). *Free Markets and Social Regulation: A Reform Agenda of the Global Trading System.* the Hague: Kluwer Law International.

Choudhury, B., Gehne, K., Heri, S., Humbert, F., Kaufmann, C., & Schefer, K. N. (2011). A Call for a WTO Ministerial Decision on Trade and Human Rights. In T. Cottier, & P. Delimatsis (Red.), *the Prospect in International Trade Regulation: From Fragmentation to Coherence* (pp. 323-333). Cambridge: Cambridge University Press.

Conant, M. (2009). *The Constitution and Economic Regulation: Objective Theory and Critical Commentary.* New Jersey: Transaction Publishing.

Congress, t. U. (2003, May 14). 108 Congress: The WTO's Challenge to FSC/ETI Rules and Effect on America's Small Business Owners. *Hearing of Committe on Small Business House of Representative Serial No. 108 - 114.* Washington DC: Congressi Publications.

Cottier, T. (2002). A Theory of Direct Effect in Global Law. In A. Von Bogdandy, P. C. Mavroidis, & Y. Meny, *European Integration and International Co-ordinationStudies in Transnational Economic Law in Honour of Claus-Dieter Ehlermann* (p. 102). the Hague: Kluwer Law International.

Cottier, T. (2007). *the Challenge of WTO Law: Collected Essay.* London: Cameron May Publishing.

Cottier, T., & C., P. (2003). Concluding Remark. In T. Cottier, & P. C. Mavroidis, *The Role of the Judge in International Trade Regulation: Experience and Lesson for the WTO* (pp. 349, 353). Ann Arbor: Michigan University Press.

Craig, P. P. (2008). *EU Law Text, Cases and Materials: Fourth Edition.* Oxford: Oxford University Press.

Craig, P., & De Burca, G. (2011). *EU Law, Text, Cases and Materials* (5nd ed.). Oxford: Oxford University Press.

Crawford, J. (2002). *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries.* Cambridge: Cambridge University Press.

Curtis, D., & Williams, S. C. (2008). *Commercial Law.* South Carolina: Biblio Bazar LLC.

Cygan, A. (2011). The European Court of Justice and External Relations: Internationalist Objectives or Integrationist Policy. In J. U. Wunderlich, & D. J. Bailey, *The European Union and Global Governance: A Handbook* (p. 112). London: Routledge International Handbook Publishing.

Czako, J., Human, J., & Miranda, J. (2003). *A Handbook on Anti-Dumping Investigations.* Cambridge: Cambridge University Press.

Daniel, A. (2009). *Is Economic Integration the Motor of all European Integration? The Debate Surrounding the Service Directive: Essay.* Munchen: GRIN Verlag.

D'Anieri, P. (2010). *International Politics Power and Purpose in Global Affairs.* Ohio: Wadsworth Cengage Learning.

Davey, W. J. (2004). Dispute Settlement Practice Relating to GATT 1994. In F. Ortino, & E.-U. Petersmann, *The WTO Dispute Settlement System 1995-203 (Studies in Transnational Economic Law Vol. 18)* (p. 210). the Hague: Kluwer Law International Publisher.

Davey, W. J. (2007). Evaluating WTO Dispute Settlement: What Results Have Been Achieved through Consultations and Implementation of panel Reports? In Y. Taniguchi, A. Yanovich, & J. Bohanes (Red.), *The WTO in the Twenty-first Century: Dispute Settlement, Negotiations, and Regionalism in Asia* (p. 107). Cambridge: Cambridge University Press.

Denza, E. (2002). *The Intergovernmental Pillars of the European Union.* Oxford: Oxford University Press.

Dicey, A. V. (1982). Introduction to the Study of the law of Constitution. In R. E. Michener (Red.), *Introduction to the Study of the law of Constitution* (p. 417). Indianapolis: Liberty Fund Publishing.

Dietze, G. (1985). *America's Political Dilemma: From Limited to Unlimited Democracy.* Maryland: the University of America Press.

Dunnof, J. (2009). the Politics of International Constitutions: the Curious Case of the World Trade Organization. In J. L. Dunnof, & J. P. Trachtman, *Ruling the World?:*

Constitutionalism, International Law and Global Governance (p. 189). Cambridge: Cambridge University Press.

Eckes, C. (2012). International Law as Law of the EU: The Role of European Court of Justice. In E. Cannizzaro, P. Palchetti, & R. A. Wessel, *International Law as Law of the European Union* (p. 366). Leiden: Martinus Nijhoff Publishing.

Eeckhout, P. (2011). *EU External Relations Law (Second Edition),* . Oxford: Oxford University Press.

Eide, A. (2001). Economic, Social and Cultural Rights as Human Right. In A. Eide, C. Krausse, & A. Rosas, *Economic, Social and Cultural Rights: A Text Book (Second Edition)* (pp. 21-22). Leiden: Martinus Nijhoff Publisher.

Eritja, Mar Campins, (2006), 'Review the Challenging Task Faced by Member States in Implementing the Emissions Trading Directive: Issues of Member State Liability', in Peeters, M. and Deketelaere, K., *EU Climate Change Policy: the Challenge of New Regulatory Initiatives*, (p. 77), Gloss:Edwar Elgar Publishing.

Evans, G. E. (2000). Law Making Under the Trade Constitution : A study in Legislating by the World Trade Organization. In *Studies in Transnational Economic Law, Vol. 14* (p. 214). the Hague: Kluwer Law International Publishing.

Fabri, H. R. (2013). The Relationship between Negotiations and Third-Party Dispute Settlement at the WTO, with an Emphasis on the EC-Banana Dispute. In L. B. de Chazournes, M. G. Kohen, & J. E. Vinuales (Red.), *Diplomatic and Judicial Means of Dispute Settlement* (p. 93). Leiden: Martinus Nijhoff Publisher.

Fairgrieve, D. (2003). *State Liability in Tort: A Comparative Law study.* Oxford: Oxford Univeristy Press.

Fidler, D. P., Drager, N., Correa, C., & Aginam, O. (2006). Making Commitments in Health Services under the GATS: Legal Dimensions. In C. Blouin, N. Drager, & R. Smith, *International Trade in Health Services and the GATS* (pp. 150-155). Washington DC: The World Bank Publications.

Finger, J. M. (2002). Reciprocity in the WTO. In B. Hoekman, A. Mattoo, & P. English, *Development, Trade and the WTO: A Handbook* (p. 67). Washington: the World Bank.

Fischel, W. A. (1995). *Regulatory Takings: Law, Economics, and Politics.* Cambridge M.A: the President and Fellows of Harvard Publishing.

Fish, A. I., & Wharton, H. (1861). *The American Law Register Vol. IX, D.B.* Washington: Canfield & Co. Goldsmiths Hall.

Fitzgerald, J., & Olivo, L. (2005). *Fundamental of Contract Law, Second Edition.* Toronto: Emond Montgomery Publications.

Fitzmaurice, G. (1957). the General Principle of International Law Considered from Standpoint of the Rule of Law. *Recuil des Cours*, 71.

Foster, N., (2013), *Foster on EU Law (Fourth Edition)*(p.224), Oxford: Oxford University Press.

Friedman, M., & Friedman, R. (1990). *Free to Choose: A personal Statement – A Classic Inquiry into the Relationship between Freedom and Economics.* Orlando: A Harvest Book (Harcourt Inc).

Friedmann, W. G. (1972). *Law in a Changing Society*. London: Steven & Sons Ltd.

Fuke, T. (1999). Historical Phases of State Liability as Law of Remedies - Some Introductory Remarks. In Y. Zhang (Red.), *Comparative Studies on Governmental Liability in East and Southeast Asia: Public Law in East and Southeast Asia* (pp. 1-6). the Hague: Kluwer Law International.

General, C. (1981). *US Laws and Regulations Applicable to Imports fom Non Market Economies Could be Improved?* Washington: US House of Congress.

Grabitz E. (1988). Liability for Legislative Acts. In H. H. Schermers, & P. Mead, *Non-Contractual Liability of the European Communities* (pp. 1-11). the Hague: Kluwer Law International.

Grant, W. (1997). *The Common Agricultural Policy (the European Union Series).* New York: St. Martin's Press.

Groussot, X., & Lidgard, H. H. (2008). Are There General Principles of Community Law Affecting Private Law? In U. Bernitz, J. Nergelius, & C. Cardner (Red.), *General Principles of EC Law in a Process of Development* (pp. 60-61). the Hague: Kluwer Law International.

Gwartney, J., & Lawson, R. (2004). *Economic Freedom of the World, 2004 Annual Report.* Vancouver: the Fraser Institute.

Haley, S., Pearce, R., & Stockbridge, M. (1998). *the Implications of the Uruguay Round Agreement on Agriculture for Developing Countries: A Training Manual.* New York: FAO - UN Publications.

Hargreaves, S. &Homewood, Matthew J., (2013), *EU Law (Third Edition)*, Oxford: Oxford University Press.

Hart, M. (2008). *From Pride to Influence: Towards a New Canadian Foreign Policy.* Vancouver: UCB Press.

Hartley, T. (2007). *The Foundation of European Community Law* (6nd ed.). Oxford: Oxford University Press.

Hartley, T., (2010), The *Foundation of European Union Law* (6nd ed) (p.123), Oxford: Oxford University Press.

Hartmann, T. (2010). *Unequal Protection: How Corporations become people and How can you fight back?* California: Berret-Koehler Publisher.

Hauser, H. (1988). Foreign Trade and the Function of Rules for Trade Policy Making. In D. C.-U. Dicke, *Foreign Trade in the Present and A New Economic Order* (pp. 18-38). Fribourg: Fribourg University Press.

Henkin, L. (1995). *International Law: Politics and Values.* Leiden: Martinus Nijhoff Publisher.

Heukels, T., & McDonnel, A. (1997). *The Action For Damages in Community Law*. the Hague: Kluwer Law International.

Heukels, T., (1997), 'The Contractual Liability of the European Community Revisited', in Heukels, T. & McDonnel, A., *The Action for Damages in Community Law* (p.89-107), The Hague:Kluwer Law International.

Hilf, M. (1997). The Role of National Courts in International Trade Relations. In E.-U. Petersmann, *International Trade Law and the GATT/WTO Dispute Settlement System* (pp. 559-579). the Hague: Kluwer Law International Publishing.

Hirschl, R. (2004). *Toward Juristocracy: The Origins and Consequences of the New Constitutionalism.* Cambridge MA: the President and Fellows of Harvard College Press.

Hoekman, B. (2002). the WTO: Function and Basic Principles. In B. M. Hoekman, *Development Trade, and the WTO: A Handbook* (pp. 41-49). Washington DC: the World Bank Publications.

Hofmann, Herwig C.H., Rowe, Gerard C. & Turk, Alexander H., (2011), *Administrative Law and Policy of the European Union*(p.129-132), Oxford:Oxford University Press.

Holdgaard, R. (2008). *External Relations Law of the European Community: Legal Reasoning and Legal Discourse.* the Hague: Kluwer Law International.

Horspool, M., & Humpreys, M. (2006). *European Union Law*. Oxford: Oxford University Press.

Horspool, M. and Lumphreys, M., (2012), *European Union Law (7nd ed)* (p.266),Oxford:Oxford University Press.

Howse, R., & Nicolaidis, K. (2001). Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step Too Far? In R. S. Porter, *Efficiency, Equity and Legitimacy: the Multilateral Trading System at the Millenium* (p. 228). Washington DC: Brooking Institution Press.

Hudec, R. E. (2000). *Broadening the scope of Remedies in WTO dispute Settlement.* London: Cameron May Publisher.

Hurst, J. (1970). *The Legitimacy of the Business Corporation in the Law of the United States in 1780-1780.* Virgina: The University Press of Virginia.

Irwin, D. (1996). *Against the Tide: An Intellectual History of Free Trade.* New Jersey: Princeton University Press.

Ishay, M. R. (2007). *the Human Rights Reader: Major Political Essays, Speeches, and Documents from Ancient Time to Present (second edition), .* New York: Routledge.

Jackson, J. H. (1990). *Restructuring the GATT System.* London: Royal Institute of International Affairs.

Jackson, J. H. (1997). *The World Trading System, Law and Policy of International Economic System, Second Edition.* Massachusets: Massachusets Institute of Technology Press.

Jackson, J. H. (1997). *The World Trading System: Law and Policy of International Economic Law (second Edition), .* Massachusetts: Massachusetts Institute of Technology Press.

Jackson, J. H. (1998). Designing and Implementing Effective Dispute Settlement Procedures: WTO Dispute Settlement, Appraisal and Prospects. In A. O. Krueger, *The WTO as an International Organization* (p. 166). Chicago/London: Chicago University Press.

Jackson, J. H. (2000). *The Jurisprudence of GATT and the WTO: Insight on Treaty Law and Economic Relations.* Cambridge: Cambridge University Press.

Jackson, J. H. (2006). *Sovereignty, the WTO and Changing Fundamentals of International Law.* Cambridge: Cambridge University Press.

Jackson, J. H., Davey, W. J., & Sykes, A. O. (2002). *Legal Problems of International Economic Relations: Cases, Materials, and Text on the National and International Regulation of Transnational Economic Relations.* New York: West Publishing.

Jacobs, Francis G, (2001), 'Some Remarks on Community and Member State Liability', in Wouters, J., Stujck, J. and Kruger, T, *Principles of Proper Conduct for Supranational, States and Private Actors in the European Union: Towards a Ius Commune* (p.130-132). Antwerp:Intersentia Publisher.

James, S. (1999, January 20). Banana War Threatens Jobs and Heralds Wider Trade Conflicts. Michigan.

Josling, T. (2003). Bananas and the WTO: Testing the New Dispute Settlement Process. In T. Josling, & T. Taylor, *Banana Wars: The Anatomy of A Trade Dispute* (p. 177). Oxon: CABI Publishing.

Justice, P. C. (1926). *Publications of the Permanent Court of International Justice Series A No. 7, Collection of Judgments.* Leiden: A.W. Sijthoff Publisher.

Kaczorowska, A. (2011). *European Union Law (Second Edition).* New York: Routledge.

Kapteyn, P. (2008). Administration of Justice. In P. Verloren Van Themaat, & K. P.J.G (Red.), *The Law of the European Union and the European Communities* (p. 476). the Hague: Kluwer Law International.

Keenan, D. a. (2007). *Business Law Edition 7.* London: Edinburgh Gate Publishing.

Kelsen, H. (2009). *General Theory of Law and State (translated by Anders Wedberg).* New Jersey: Lawbook Exchange Ltd.

Kent, P., (2008), *Law of the European Union* (4nd ed.), Essex: Pearson Education Limited.

Keynes, E. (1996). *Liberty, Property and Privacy : Toward a Jurisprudence of Substantive Due Process.* Pennsylvania: the Pennsylvania State University Press.

Kim, D.-W. (2006). *Non-Violation Complaints in WTO Law : Theory and Practice.* Bern: Peter Lang.

Klabbers, J. (2001-2002). International Law in Community Law: The Law and Politics of Direct Effect. In P. Eechout, T. Tridimas, & G. De Burca, *21 year Book European Law* (p. 274). Oxford: Oxford University Press.

Kofele-Kale, N. (2006). *The International Law of Responsibility for Economic Crimes.* Farnham: Ashgate Publishing.

Kohona, P. T. (1985). *the Regulation International Economic Relations through Law.* Leiden: Martinus Nijhoff Publisher.

Kong, Q. (2002). *China and the World Trade Organization: a Legal Perspective.* London: Wold Scientific Publisher.

Kratochwill, F. V. (1999). *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs.* Cambridge: Cambridge University Press.

Kuilwijk, K. J. (1996). *The European Court of Justice and the GATT Dilemma: Public Interest versus Individual Right.* Lahore: Nexus Edition Academic Publisher.

Kunig, P., Lau, N., & Meng, W. (1993). *International Economic Law: Basic Documents.* Berlin: Walter de Gruyter & Co.

Kuttner, R. (1999). *the End of Laissez-faire: National Purpose and the Global Economy after the Cold War.* Pennsylvania: University of Pennsylvania Press.

Lang, J. T. (2000). The Principle of Effective Protection of Community Law Rights. In D. O'Keeffe, & B. Antonio, *LIBER AMICORUM in Honour of Lord Slynn of Hadley : Judicial Review in European Union Vol.I* (p. 250). The Hague: Kluwer Law International Publisher.

Larragan, J., (2011), *Distributional Choices in EU Climate Change Law and Policy: Towards a Principle Approach?*(p.153), Alphen: Kluwer Law International.

Lawrence, R. Z. (2003). *Crimes & Punishment ?: Retaliation under the WTO.* Washington: Institute for International Economics Publisher.

Leebron, D. W. (1997). Implementation of the Uruguay Round Results in the United States. In J. H. Jackson, & A. O. Sykes Jr., *Implementing the Uruguay Round* (p. 212). London: Clarendon Press.

Lester, S., Mercurio, B., Davies, A., & Leitner, K. (2008). *World Trade Law, Text, Material and Commentary.* Oregon: Hart Publishing.

Lindblom, A.-K. (2005). *Non-Governmental Organizations in International law.* Cambridge: Cambridge University Press.

Llorens, A. A. (1996). *Private Parties in European Community Law: Challenging Community Measures.* Oxford: Clarendon Press.

Locke, J. (. (1988). Two Treatises of Government: Critical Edition with an Introduction and apparatus criticus. In P. Laslett, *Two Treatises of Government: Critical Edition with an Introduction and apparatus criticus* (p. 131). Cambridge: Cambridge University Press.

Lopez-Mata, R. (2001). Income Taxation, International Competitiveness and the World Trade Organization's Rules on Subsidies: Lessons to the U.S. and the World from the FSC Dispute. *Tax Law Review, 54*, 604.

Love, P., & Lattimore, R. (2009). *International Trade: Free, Fair and Open?* Denvers: OECD INSIGHTS.

Luber, M. (2008). Liability of the State. In W. M. (Red.), *Key Aspect of German Business Law – A Practical Manual* (p. 263). Berlin Heidelberg: Springer Verlag Publishing.

MacDonald, K., & Woolcock, S. (2007). Non-State Actors in Economic Diplomacy. In N. Bayne, & S. Woolcock, *The New Economic Diplomacy: Decision Making and Negotiation in International Economic Relations (Second Edition)* (p. 78). London: Ashgate Publishing.

Makarczyk, J. (1988). *Principles of a New International Economic Order: A Study of International Law in the Making* . Leiden: Martinus Nijhoff Publisher.

Malanczuk, P. (1997). *Akehurts's: Modern Introduction to International Law (Seventh Edition).* London: Routledge Publishing.

Malone, A. P., & Karnes, A. (2008). *The American Legal System: Perspective, Politics, Processes and Policies (Second Edition),.* Maryland: Rowman & Littlefield Publisher.

Marsh, S., & Soulsby, J. (2002). *Business Law: Eight Edition.* Edinburgh: Nelson Thomas Ltd.

Martin, M. (2013). *WTO Dispute Settlement Understanding and Development.* Leiden: Martinus Nijjhof Publisher.

Mathews, D. (2002). *Globalizing Intellectual Property Rights: The TRIPS Agreement.* London: Routledge Publisher.

Mathijsen, P. (2004). *A Guide to European Union Law (Eight Edition).* London: Sweet Maxwell Publishing.

Matsushita, M. S. (2002). *the World Trade Organization.* Oxford: Oxford University Press.

Matsushita, M., Schoenbaum, T. J., & Mavroidis, P. C. (2003). *The World Trade Organization Law, Practice, and Policy.* Oxford: Oxford University Press.

Mattoo, A. (1998). Dealing with Monopolies and State Enterprise: WTO Rules for Goods and Services. In T. Cottier, P. C. Mavroidis, & K. N. Schefer, *State Trading in the Twenty First Century (Studies in International Economics – The World Trade Forum Vol. I)* (pp. 37-69). Michigan: the University of Michigan Press.

Mavroidis, P. C. (2002). Amicus Curiae Briefs Before the WTO: Much Ado About Nothing. In C.-D. Ehlermann, A. Von Bogdandy, P. C. Mavroidis, & Y. Meny, *European Integration and International Co-ordination: Studies in Transnational Economic Law in Honor of Claus-Dieter Ehlermann* (pp. 317-330). the Hague: Kluwer Law International.

McCrudden, C. (2004). Property Rights and Labor Rights Revisited: International Investment Agreements and The "Social Clause" Debate. In M. Irish (Red.), *The Auto Pact: Investment, Labor and the WTO* (p. 305). the Hague: Kluwer Law International Publishing.

Miller, R. L., & Jetnz, G. D. (2010). *Fundamentals of Business Law and Summarized Cases, 8th Edition.* Ohio: South-Western Cengage Learning.

Moens, G., & Trone, J. (2010). Commercial Law of the European Union. In M. Sellers, & J. Maxeiner, *Ius Gentium: Comparative Perspectives on Law and Justice No. 4* (p. 73). New York: Springer Science+Business Media.

Molyneux, C. T. (2001). *Domestic Structure and International Trade: the Unfair Trade Instruments of the United States and the European Union.* Oxford: Hart Publishing.

Moser, P. (1990). *The Political Economy of the GATT* . Bern: Verlag Ruegger Publishing.

Mountjoy, S. (2009). *Marbury V. Madison: Establishing Supreme Court Power.* New York: Infobase Publishing.

Murphy, S. D. (2002). *United States Practice in International Law Volume1: 1999-2001*. Cambridge: Cambridge University Press.

Nakagawa, J. (2007). *Anti-Dumping Laws and Practices of the New User.* London: Cameron May Publisher.

Nanto, D. K. (2000). Dispute Settlement Under the WTO and Trade Problems with Japan. In A. Babkina, *World Trade Organization: Issue and Bibliography* (p. 37). New York: Nova Science Publisher.

Nations, P. o. (2002). *Manual on Statistic of International Trade in Services.* New York: UN Publications.

Naverson, J. (1992). Democracy and Economic Rights. In E. F. Paul, *Economic Rights* (p. 41). Cambridge: Cambridge University Press & Social Philosophy and Policy Foundation.

Nollkaemper, A. (2012). The Role of National Courts in Inducing Compliance with International and European Law – A Comparison. In Cremona, M, *Compliance and the Enforcement of EU Law, Vol. 20, Book 2*. (p. 186).Oxford: Oxford University Press – Oxford/UK.

Nove, A. (1987). *Planned Economic in the New Palgrave: A Dictionary of Economics.* New York: Stockton Press.

Nsour, M. F. (2010). *Rethinking the World Trade Order towards A Better Legal Understanding of the Role of Regionalism in the Multilateral Trade Regime.* Leiden: Sideston Press.

OECD, S. G. (2005). *Corporate Governance of State Owned Enterprises: A Survey of OECD Countries.* Paris: OECD Publishing.

OECD. (1997). *The OECD Report on Regulatory Reform, Volume I: Sectoran Studies.* Paris: OECD Publishing.

OECD. (2001). *Trade in Services: Negotiating Issues and Approaches.* Paris: OECD Publications.

Ohlhof, S., & Schloeman, H. (2001). Transcending the Nation-States? Private Parties and the Enforcement of International Trade Law. In J. Frowein, & R. Wolfrum, *Max Planck Yearbook of United Nations Law* (pp. 675-734). the Hague: Kluwer Law International.

Ostrihansky, R. (1992). Settlement of Interstate Trade Disputes – The Role of Law and Legal Procedures . In T. A. Institute, *Netherland Yearbook on International Law 1991, Vol XXII* (p. 174_175). the Hague: T.M.C. Asser Institute.

Ozmanczyk, E. J. (2003). *Encyclopedia of the United Nations and International Agreements: Third Edition, Vol. 1 A-F,.* (A. Mango, Red.) New York: Routledge.

Palmeter, D. (1998). The WTO Antidumping Agreement and the Economy in Transition . In T. a. Cottier, *State Trading in the Twenty-First Century* (pp. 115-120). Ann Arbor Michigan: University of Michigan Press.

Palmeter, D., & Mavroidis, P. (2004). *Dispute Settlement in the World Trade Organization; Practice and Procedure, Second Edition.* Cambridge: Cambridge University Press.

Panitchpakdi, S. (2001). Balancing Competing Interest: The Future Role of the WTO. In G. P. Samson (Red.), *The Role of the World Trade Organization in Global Governance* (pp. 29-36). Tokyo: United Nations University Press.

Pauwelyn, J. (2003). *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International law.* Cambridge: Cambridge University Press.

Pauwelyn, J. (2010). The Calculation and design of trade retaliation in context: What is the goal of suspending WTO Obligations? In C. P. Bown, & J. Pauwelyn, *The Law, Economics and Politics of Retaliation in the WTO Dispute Settlement* (pp. 44-46). Cambridge: Cambridge University Press.

Peers, S. (2001). Fundamental Right or Political Whim? WTO Law and the European Court of Justice. In G. De Burca, & J. Scott, *The EU and the WTO: Legal and Constitutional Issues* (p. 111). Oxford: Hart Publisher.

Pennsylvania Constitution of 1776, Declaration of Rights, Article VIII. In W. F. Swindler, *Sources and Documents of the United States Constitutions, 10 Volumes* (p. 278). New York: Dobbs Ferry Oceanna Publications.

Perkams, M. (2010). The Concept of Indirect Expropriation in Comparative Public Law – Searching for Light in the Dark. In S. Schill, *International Investment Law and Comparative Public Law* (p. 145). Oxford: Oxford University Press.

Petersman, E.-U. (1991). *Constitutional Functions and Constitutional Problems of International Economic Law.* Fribourg: Fribourg University Press.

Petersman, E.-U. (1995). Rights and Duties of Their Citizens: Toward the "Constitutionalization" of the Bretton Wood System Fifty Years after its Foundation. In U. Beyerlin, B. M., H. R., & P. E.U., *RechtZwischenUmbruch and Bewahrung: Festschrift fur Rudolf Benhard* (pp. 1087-1128). Berlin: Springer Verlag.

Petersman, E.-U. (2000). Judicial Protection of Economic Freedom in National and International Law: Time for Bringing Rights Home. In M. Andenas, & D. Fairgrieve, *Judicial Review in International Perspective (Liber Amicorum, in Honour of Lord Slynn of Hadley)* (pp. 475-476). the Hague: Kluwer Law International.

Petersman, E.-U. (2002). Constitutionalism and WTO: from a State – Centered Approach towards a Human Rights Approach in International Economic. In D. L. Kennedy, & J. D. Southwick, *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* (pp. 32-67). Cambridge: Cambridge University Press.

Petersman, E.-U. (2006). Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution. In F. Abbott, C. Breining-Kaufmann, & T. Cottier, *International Trade and Human Rights: Foundations and Conceptual Issues* (pp. 29-51). Michigan: University of Michigan Press.

Petersman, E.-U. (2006). Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism. In J. C., & E.-U. Petersman, *Constitutionalism, Multilevel Trade Governance and Social Regulation* (p. 32). Oxford: Hart Publishing.

Petersman, E.-U. (2008). Constitutionalism and WTO Law: From a State Centered Approach Towards a Human Rights Approach in International Economic Law. In D. L. Kennedy, & J. D. Southwick, *The Political Economy of International Trade Law (Essays in Honor of Robert E. Hudec)* (p. 33). Cambridge: Cambridge University Press.

Petersman, E.-U. (2008). Judging Judges: From 'Principal-Agent Theory' To Constitutional Justice' In Multilevel ' Judicial Governance' of Economic Cooperation Among Citizens'. *Journal of International Economic Law, 11*(4), 827-884.

Petersman, E.-U. (2008). State Sovereignty, Popular Sovereignty and Individual Sovereignty: From Constitutional Nationalism to Multilevel Constitutionalism in International Economic Law? In W. Shan, P. Simon, & D. Singh, *Redefining Sovereignty in International Economic Law* (p. 32). Oxford: Hart Publisher.

Petersmann, E.-U. (1988). Grey Area Trade Policy and the Rule of Law. *Journal of World, 22*(2), 23-44.

Petersmann, E.-U. (1997). *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement.* The Hague: Kluwer Law International.

Petersmann, E.-U. (1998). From the Hobbesian International Law of Coexistence to Modern Integration Law: the WTO Dispute Settlement System. *Journal International Economic Law, 1*, 175-198.

Petersmann, E.-U. (2005). Bridging Foundations – Human Rights and International Trade Law: Defining and Connecting the Two Fields. In T. Cottier, J. Pauwelyn, & E. Burgi, *Human Right and International Trade* (p. 42). Oxford: Oxford University Press.

Petersmann, E.-U. (2011). Can the EU's Disregard for Strict Observance of International law' (Article 3 TEU) be Constitutionally justified? In I. Govaere, R. Quick, & M. Bronckers, *Trade and Competition Law in the EU and Beyond* (pp. 214-225). Glos: Edward Elgar Publishing.

Pierson, C. (2004). *The Modern State*. New York: Routledge Publisher.

Polouektov, A. (2002). The Non-Market Economy Issue in International Trade: In the Context of WTO Accessions. *United Nations Conference on Trade and Development* (pp. 7-37). Geneve: UNCTAD.

Prevost, D. (2008). Private Sector Food-Safety Standards and the SPS Agreement: Challenges and Possibilities. *South African Yearbook of International Law, 33*, 4-9.

Pride, W. J. (2008). *Business (tenth edition).* Ohio: South-Western Cengage Learning.

Qureshi, A. (2006). *Interpreting WTO Agreements: Problems and Perspective.* Cambridge: Cambridge University Press.

Raitio, J. (2003). *The Principle of Legal Certainty in EC Law*. the Hague: Kluwer Law International.

Raitio, J. (2008), The Principle of Legal Certainty as a General Principle of EU Law,in Bernitz, U., Nergelius J., and Cardner, Cecilia in *General Principles of EC Law in A Process of Development* (P.53-55), Alphen: Kluwer Law International.

Rapacyznski, F. A., & Earle, J. (1993). *The Privatization Process in Central Europe, London and Budapest.* Budapest: Central European University Press.

Read, R. (2005). Trade Dispute Settlement Mechanisms: the WTO Dispute Settlement Understanding in the Wake of GATT. In N. Perdikis, & R. Read (Red.), *the WTO and the Regulation of International Trade: Recent Trade Disputes between the European Union and the United States* (p. 36). Glos/UK: Edwar Elgar.

Rebhan, R. (2008). Non Contractual Liability in Damages of Member States for Breach of Community Law. In H. Koziol, & R. Schulze, *Tort Law of the European Community: Tort and Insurance Law Vol.23* (p. 189). New York: Springer Wien Publishing.

Reinisch, A. (2012). *Essentials of EU Law* (2nd ed.). Cambridge: Cambridge University Press.

Ricketts, M. (2006). Economic Regulations: Principles, History and Methods. In M. Crew, & D. Parker, *International Handbook on economic Regulation* (p. 34). London: Edward Elgar Publishing.

Rodrik, D. (2002). Trade Policy Reform as Institutional Reform. In B. M. Hoekman, & P. English (Red.), *Development, Trade, and the WTO: A Handbook Issue 1* (pp. 4-5). Wahington DC: the World Bank.

Roessler, F., & Gappah, P. (2005). A Re-appraisal of Non-Violation Complaints under the WTO Dispute Settlement Procedures'. In P. Macrory, A. Appleton, & M. and Plummer, *The World Trade Organization: Legal, economic and Political Analysis* (p. 1371). NY: Springer Publisher.

Roosebeke, B., (2007), *State Liability for Breaches of European Law: an Economic Analysis* (p.15-16), Wiesbaden: Gabler edition Wissenschaft.

Rosegrant, S. (1999). *Banana Wars: Challenges to the European Union's Banana Regime.* Cambridge MA: Harvard University Press.

Rosenberg, R., & Ott, W. (1977). *College business law, Shaum's Outline Series.* New York: McGraw-Hill.

Sanson, M. (2002). *Essential International Trade Law.* Newport: Cavendish Publisher.

Schafer, H.B., (2012), "Can Member State Liability for the Infringement of European Law Deter National Legislators?", in Thomas Eger and Hans-Bernd Schafer, *Research Handbook on the Economics of European Union Law* (p. 83), Glos: Edwar Elgar Publishing .

Schaffer, G. (2007). Public and Private Partnerships in WTO Dispute Settlement: the US and EU Experience. In Y. Taniguchi, A. Yanovich, & J. Bohanes, *The WTO in the Twenty-First Century: Dispute Settlement, Negotiations and Regionalism in Asia* (p. 149). Cambridge: Cambridge University Press.

Schermers, H. G. (1991). International Organizations. In M. Bedjaoui, *International Law: Achievements and Prospect (Part 1)* (pp. 67-96). Paris/Leiden: UNESCO & Martinus Nijhoff Publisher.

Schermers, H. G., & Vaelbroek, D. F. (2001). *Judicial Protection in the European Union* (6nd ed.). the Hague: Kluwer Law International.

Schiek, D. (2012). *Economic and Social Integration: The Challenge for EU Constitutional Law.* Glos: Edwar Elgar Publishing.

Schug, M. C., Caldwell, J., & Ferrarini, T. (2006). *Focus: Understanding Economics in the United States History.* New York: National Council on Economic Education Publishing.

Schultz, D. A. (2009). *Encyclopedia of the United States Constitution.* New York: Infobase Publishing.

Schutze, R. (2012). *European Constitutional Law*. Cambridge: Cambridge University Press.

Schwarzenberger, G. (1966). The Principles and Standard of International Economic Law. *Recuil des Cours I, 117*, 7.

Scout, S. D. (2002). *Constitutional Law of European Union.* London: Pearson Education Limited.

Secretariat, W. (2004). *A Handbook on the WTO Dispute Settlement System, A WTO Secretariat Publication: Prepared for Publication by Legal Affairs Division and Appellate Body.* Cambridge: Cambridge University Press.

Sen, A. (1999). *Development as Freedom.* Oxford: Oxford University Press.

Shadikhodjaev, S. (2009). *Retaliation in the WTO Dispute Settlement System.* The Hague: Kluwer Law International.

Shaffer, G. C. (2003). *Defending Interest Public-Private Partnerships in WTO Litigation.* Washington DC: the Brooking Institution.

Shahin, M. (2011). WTO Dispute Settlement for Middle-Income Developing Country: The Situation Egypt. In G. C. Shaffer, & R. M. Ortiz, *Dispute Settlement at the WTO: the Developing Country Country Experience* (pp. 282 - 284). Cambridge: Cambridge University Press.

Shelton, D. (1999). *Remedies in International Human Rights Law.* Oxford: Oxford University Press.

Simmons, A. J. (1992). *The Lockean Theory of Rights.* New Jersey: Princeton University Press.

Slotboom, M. (2006). *A Copmarison of WTO and EC Law: Do Different Objects and Purposes Matter for Treaty Interpretation?* London: Cameron May Publisher.

Smith, A. (1776 (Reprinted 1937)). *The Wealth of Nations* . New York: Modern Library Press.

Snyder, R. C. (1948). *The Most Favored Nation Clause.* New York: King's Crown Press.

Stephen Jr., O. H., & Scheb II, J. M. (2008). *American Constitutional Law (Vol. II) : Civil Rights and Liberties.* Ohio: Thomson Wadsworth Publishing.

Stoll, P. T., & Schorkopf, F. (2006). *WTO- World Economic Order, World Trade Law', in Max Planck Commentaries on the World Trade Law, Max Planck Institute for Comparative Law and International Law.* Leiden: Martinus Njhoff Publishing.

Stoll, P.-T., & Schofkopf, F. (2006). *WTO, World Economic Order.* Leiden: Martinus Nijhoff Publisher.

Stovall, J., & Hathaway, D. (2003). U.S. Interest in the Banana Trade Controversy. In E. Josling, & T. T.G., *Banana Wars: The Anatomy of a Trade Dispute* (pp. 154 - 155). Oxon: CABI Publishing.

Strange, S. (1992). States, Firms, and Diplomacy. *International Affairs, 68*(1), 1-15.

Subedi, S. P. (2007). *International Economic Law, Section A: Evolution and Principles of International Economic Law.* London: The University of London Press.

Subramanian, A. (2003). India as User and Creator of Intellectual Property: The Challenges Post-Doha. In R. M. Stein, & A. Mattoo, *India and the WTO* (pp. 169-180). Washington & Oxford: the World Bank & Oxford University Press.

Szyszcak, E., & Cygan, A. (2008). *Understanding EU Law: Second Edition.* London: Sweet & Maxwell.

Tangermann, S. (2003). European Interest in The Banana Market. In E. Josling, & T. Taylor, *Banana Wars: The Anatomy of a Trade Dispute* (p. 22). Oxon: CABI Publishing.

Thies, A. (2013). *International Trade Dispute and EU Liability.* Cambridge: Cambridge University Press.

Trachman, J. P. (2003). Private Parties in EC-US Dispute Settlement at the WTO: Toward Intermediated Domestic Effect. In E.-U. Petersmann, & M. A. Pollack, *Translantic Economic Disputes: the EU, the U.S. and the WTO* (p. 530). Oxford: Oxford University Press.

Trebilcock, M. J., & Howse, R. (2013). *The Regulation of International Trade* (4th ed.). London: Routledge Publisher.

Tridimas, T. (2001). Judicial Review and the Community Judicature: Towards A New European Constitutionalism? In J. Woulters, & J. Stuyck (Red.), *Principle of Proper Conduct for Supranational State and Private Actors in the European Union* (pp. 77-78). Antwerpen: Intersentia Publishing.

Tridimas, T. (2006). *The General Principle of EU Law*, Oxford:Oxford University Press.

Tumlir, J. (1983). International Economic Order and Democratic Constitutionalism. *ORDO – Jahrbuch Fur die Ordnung von Wirtschaft und Gesselschaft* , 71-83.

Turk, A. H. (2009). *Judicial Review in EU Law.* Glos: Edwar Elgar Publishing.

United Nations, (2000), Yearbook *of International Law Commission 2000*, Vol. II, Part One, New York: United Nation Publication.

Van Banning, T. R. (2001). *the Human Right to Property.*Antwerpen: Intersentia Publishing.

Van Dam, C. (2013). *European Tort Law* (2nd ed.). Oxford: Oxford University Press.

Van den Bossche, P., & Zdouc, W. (2013). *The Law and Policy of the World Trade Organization (Third Edition).* Cambridge: Cambridge University Press.

Van den Bosshe, P. (2005). *The Law and Policy of the World Trade Organization; Text, Cases and Materials.* NY/London: Cambridge University Press.

Van den Broek, N. (2009). Enforcing WTO Compliance through Public Opinion and Direct Effect: Two New Proposals to enhance the Compliance Perspective for Least Developed WTO Members. In J.C. Hartigan, *Frontiers of Economics and*

Globalization, Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment, ed., Bingley: Emerald Group Publishing.

Van Roosebeke, B. (2007). *State Liability for Breaches of European Law: An Economic Analysis.*Wiesbaden: Deutscher Universitäts-Verlag | GWV Fachverlage GmbH, (DUV) .

Van Theemat, P. V. (1981). *The Changing Structure of International Economic Law.* Leiden: Martinus Nijhoff Publisher.

Van Thiel, S., & Steinbach, A. (2005). The Effect of WTO Law in the Legal Order of the European Community: Judicial Protection Deficit or a Real Political Solution, or Both? In M. Lang, J. Herdin, & Hofbauer, *WTO and Direct Taxation* (p. 67). the Hague: Kluwer Law International.

Verma, S. (2004). *An Introduction to Public International Law.* New Delhi: Phi Learning Ltd.

Voitovich, S. A. (1995). *International Economic Organizations in the International Legal Process.* Leiden: Martinus Nijhoff Publisher.

Von Bar, C. (2009).*Principle of European Law: Study Group on a European Civil Code, Non-Contractual Liability Arising out of Damage Caused to Another*, Munich:European Law Publisher.

Vranes, E., (2003), 'European Human Right Protection and the Contested Relationship of the ECJ and National Courts: Convergent Solution under International European and National Law?', in Breuss, F., Griller, S. &Vranes, E. *The Banana Dispute An Economic and Legal Analysis* (p. 198). New York: SpringerWien.

Waincymer, J. (2002). *WTO Litigation: Procedural Aspects of Formal Dispute Settlement.* London: Cameron May.

Weatherill, S. (2012), *Cases and Materials on EU Law*, Oxford:Oxford University Press.

Weiler, J. (1999). *the Constitution of Europe.* Cambridge: Cambridge University Press.

Williamson, O. (1985). *the Economic Institutions of Capitalism.* New York: Free Press.

Woods, L. &Watson, P. (2013).*Steiner & Woods EU Law*, Oxford: Oxford University Press.

Wouters, J., & De Meester, B. (2007). *The World Trade Organization: A Legal and Institutional Analysis.* Antwerpen: Intersentia.

Yang, G. (2005). *WTO Dispute settlement Understanding: Detailed Interpretation.* the Hague: Kluwer Law International.

Young, K. G. (2012). *Constituting Economic and Social Rights.* Oxford: Oxford University Press.

Zaphiriou, G. (1970). *European Business Law*. London: Sweet & Maxwell Publisher.

Zemanek, K., (2000), Responsibility of States: General Principles, in: *Encyclopedia of Public International Law*. Volume four (p. 220). Amsterdam: North Holland Publishing

Ziegler, K. (2011). International Law and EU Law: Between Asymmetric Constitutionalism and Fragmentation. In A. Orakhelashvili, *Research Handbook on the Theory and History of International Law* (p. 300). Glos: Edward Elgar Publishing.

Zimmermann, T. A. (2005). *Negotiating the Review of the WTO Dispute Settlement Understanding*. London: Cameron May.

Zurn, M., &Joerges, C. (2005).*Understanding Compliance with International Law, Law and Governance in Postnational Europe: Compliance Beyond the Nation-State*, Cambridge: Cambridge University Press.

B. JOURNAL

Ala'i, P. (2000). Judicial Lobbying at the WTO: the Debate over the Use of Amicus Curiae Briefs and the U.S. Experience. *Fordham International Law Journal, 24*(1), 62-94.

Alemanno, A. (2004). Judicial Enforcement of the WTO Hormones Ruling Within the European Community: Toward EC Liability for the Non-Implementation of WTO Dispute Settlement Decisions? *Harvard International Law Journal, 45*(2), 560.

Alvarez, J., & Charnovitz, S. (2002). Triangulating the World Trade Organization, In Symposium: The Boundaries of the WTO. *American Journal of International Law, 96*(1), 28-55.

Amman, A. (2002). Globalization, Democracy, and the Need for A New Administrative Law. *UCLA Law Review*, 4.

Anderson, R. D., & Wager, H. (2006). Human Rights, Development, and the WTO: the Case of Intellectual Property and Competition Policy. *Journal of International Economic Law, 9*(3), 707-747.

Antoniadis, A. (2007). the European Union and WTO Law: A Nexus of Reactive, Coactive and Proactive Approaches. *World Trade Review, 6*(1), 45-87.

Barcelo III, J. J. (2006). The Status of WTO Law in U.S. Law. *Cornell Law Faculty Publications*(36), 1-34.

Barcelo, J. J. (2006). The Paradox of Excluding WTO Direct and Indirect Effect in U.S. Law, in Tulane European and Civil Law Forum. *Tulane School of Law Journal*, 148.

Bhala, R. (2000). The Banana War. *Mc George Law Review*(31), 844.

Bradley, C. (1998). The Charming Betsy Canon and Separation of Powers: Rethinking of the Interpretative Role of International Law. *Georgetown Law Journal, 86*(7), 491.

Brand, R. A. (1997). Direct Effect of International Economic Law in the United States and the European Union. *Northwestern Journal International Law & Business, 17*(1), 562-608.

Brimeyer. (2001). Bananas, Reef, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations. *Minnesota Journal of Global Trade, 10*(1), 133.

Bronckers, M. (2008). From 'Direct Effect' to 'Muted Dialogue' : Recent Developments in the European Courts' Case Law on the WTO and Beyond. *Journal of International Economic Law, 11*(4), 885-898.

Bronckers, M., & Goelen, S. (2012). Financial Liability of the EU for Violations of WTO Law: A Legislative Proposal Benefiting 'Innocent Bystanders. *Legal Issues of Economic Integration, 39*(4), 399-418.

Bruess, F. (2004). WTO Dispute Settlement: An Economic Analysis of Four EU-US Mini Trade Wars. *Journal of Industry, Competition and Trade*(4), 296.

Byrd, K. (2005). Can We Provide A Level Playing Field for U.S. Corporations and Increase U.S. Jobs While Repealing the Extraterritorial Income Act? *Houston Business and Tax Law Journal, V*, 339-365.

Cawley, J. B. (2004). Friend of the Court: How the WTO Justifies the Acceptance of the Amicus Curiae Brief from Non-Governmental Organizations. *Penn State International Law Review, 23*(1), 47-78.

Chapman, A. R. (2002). The Human Rights Implications of Intellectual Property Protection, in Mini-Symposium: Health and the WTO. *Journal of International Economic Law, 5*(4), 861-882.

Charnovitz, S. (2001). Economic and Social Actors in the World Trade Organization. *ILSA Journal of International and Comparative Law*, 259-274.

Charnovitz, S. (2001). Rethinking WTO Trade Sanction. *American Journal of International Law*, 18.

Charnovitz, S. (2001). The WTO and The Rights of Individual. *Intereconomics*, 1.

Chatterjee, S. (1991). The Charter of Economic Rights and Duties of States: an evaluation after 15 years. *International & Comparative Law Quarterly, 40*(3), 100.

Chemerinsky, E. (2001). Against Sovereign Immunity. *Stanford Law Review, 53*, 1204.

Cho, S. (2004). The Nature of Remedies in International Trade Law. *University of Pittsburgh Law Review, 65*(763), 5.

Cooper, R. (1967). National Economic Policy in An Interdependent World Economy. *Yale Law Journal, 76*(7), 1273.

Cottier, T., & Oesch, M. (2001). WTO Law, Precedents and Legal Change. *Turku Law Journal, 3*(1), 27-41.

Cottier, T., & Schefer, K. (1998). the Relationship between World Trade Organization Law, National Law and Regional Law. *Journal of International Economic Law, 1*(1), 83-122.

Dani, M. (2010). Remedying European Legal Pluralism: The FIAMM and FEDON Litigation and the Judicial Protection of International Trade Bystanders. *European Journal of International Law, 21*(2), 309.

David, R., & Tunc, A. E. (1983). *International Encyclopedia of Comparative Law*. Leiden: Martinus Nijhoff Publishing.

Davies, A. (2006). Reviewing Dispute Settlement at the World Trade Organization: A Time to Reconsider the Role/s of Compensation? *World Trade Review*(5), 31-67.

Davies, A. (2007). Connecting or Compartmentalizing the WTO and United States Legal Systems? The Role of the Charming Betsy Canon. *Journal of International Economic Law, 10*(1), 117-149.

Delbrùck, J. (1993). Globalization of Law, Politics, and Markets-- Implications for Domestic Law--A European Perspective. *Indiana Journal of Global Legal Studies, 1*, 1-9.

Desai, M. A., & Hines, J. R. (2000). The Uneasy Marriage of Export Incentives and the Income Tax. *Michigan School of Business Office of Tax Policy Research*, 1-40.

Di Gianni, F., & Antonini, R. (2006). DSB Decisions and Direct Effect of WTO Law: Should the EC Courts be more Flexible when the Flexibility of the WTO System has Come to an End? *Journal of World Trade, 40*(4), 777-793.

Dicken, P. (1998). Global Shift: The Internalization of Economic Activity. *Indiana Journal of Global Legal Studies, 1*, 1-40.

Dinah, S. (1994). the Participation of Non-Governmental Organizations in International Judicial Proceeding. *American Journal of International Law, 88*, 611.

Dunoff, J. L. (2008-2009). Less than Zero: the Effect of Giving Domestic Effect to WTO Law. *Loyola University Chicago International Law Review, 6*(1), 279-310.

Eagle, E. (2009). Constitutive Cases: Marbury v. Madison Meets Van Gend Loos. *Hanse Law Review, 5*, 33-46.

Eeckhout, P. (1997). The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems. *Common Market Law Review, 34*(1), 11-29.

Egli, P. (2006). Le´on Van Parys NV v. BelgischInterventie- en Restitutiebureau: ECJ judgment on effect of WTO agreements and dispute settlement decisions in EC law. *American Journal of International Law, 100*(2), 449-454.

Errico, J. (2011). The WTO in the EU: Unwinding The Knot. *Cornell International Law Journal, 44*(1), 179-191.

Esty, D. (1998). Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion. *Journal of International Economic Law, 11*, 123-147.

Emiliou, N. (1996). State Liability Under Community Law: Shedding More Light on the FrancovichPrinciple?. *European Law Review* 21, 5, p. 10.

Fons, J. A. (2009). Comparing Supremacy: Sovereign Immunity of States in the United States and Non-Contractual State Liability in the European Union. *Penn State International Law Review, 28*(2), 199.

Garten, J. E. (1995). American Trade Law in Changing World Economy. *International Lawyer Journal, 29,* 30.

Gattinara, G. (2009). The Relevance of WTO Dispute Settlement Decision in the U.S. Legal Order. *Legal Issues of Economic Integration, 36*(4), 285-312.

Heboyan, V., Ames, G. C., & Apperson, J. E. (2002). U.S.-EU Banana War: Implications of Retaliatory Tariff on Pecorino Cheese. *Journal of Euromarketing, 11*(3), 53-69.

Heyman, S. J. (1991). the First Duty of Government Protection Liberty and the Fourteenth Amendment. *Duke Law Journal, 41,* 508-570.

Horn, H., & Mavroidis, P. (1999, November 14). Remedies in the WTO Dispute Settlement System and Developing Country Interest. *Research Paper Institute for Economic Studies*. Stockholm: Center for Economic Policy Research.

Hufbauer, G. C. (2002). The Foreign Sales Corporation Drama: Reaching the Last Act? *International Economic Policy Briefs, PB02*(10), 6.

Ince, P., Akim, E., Lombard, B., & Parik, T. (2004). Chapter 8: Consumption Climbs in Central and Eastern Countries, Stagnates in the West: Markets for Paper, Paperboard and Woodpulp 2003-2004. *UNECE/FAO Forest Products Annual Market Review*, 59-60.

Jackson, J. H. (1992). Status of Treaties in Domestic Legal Systems: A policy Analysis. *America Journal of International Law, 86*, 310.

Jackson, J. H. (1995). International Economic Law: Reflections on the "Boilerroom" of International Relations'. *American University Journal of International Law & Policy*(10), 595.

Jackson, J. H. (1997). the Great 1994 Sovereignty Debate: United Stated Acceptance and Implementation of the Uruguay Round Results, Chapter 2: Constitutional Question. *Columbia Journal of Transnational Law, 36*(7), 157-173.

Jackson, V. C. (2003). Suing the Federal Government: Sovereignty, Immunity, and Judicial Independency. *George Washington International Law Review*(35), 525-527.

Jeffords, M. B. (2003). Turning the Protester into a Partner for development: The Need for Effective Consultation between the WTO & NGOs. *Brooklyn Journal of International Law, 28*(3), 937-988.

Kapp, K. W. (1939). Economic Regulation and Economic Planning. *the American Economic Review, 29*(4), 760-773.

Keefer, P. (2004). A Review of the Political Economy of Governance: from Property Right to Voice. *World Bank Policy Research*(3315), 2-43.

Keller, J. (2005). the Future of Amicus Participation at the WTO: Implications of the Sardines Decision and Suggestions for Further Developments. *International Journal of Legal Information, 33*(3), 449-470.

Khachaturian, A. (2008). Reforming the United States Export Tax Policy: An Alternative to the American Trade War with The European Union. *U.C. Davis Journal of International Law and Policy*, 191.

Kubiszewski, K. (1983). International Legislation. *EPIL, 5*, 97.

Kuijper, P. J. (1995). the Conclusion and Implementation of the Uruguay Round Results by the European Community. *European Journal of International Law*, 222-244.

Laihhold, M. (1999). Private Party Access to the WTO: Do Recent Developments in International Trade Dispute Resolution Really Give Private Organizations A Voice in the WTO? *Journal of Transnational Law, 12*, 449.

Leirer, W. W. (1994). Retaliatory Action in the United States and European Union Trade Law: A Comparison of Section 301 of the Trade Act of 1974 and Council Regulation 2641/84. *North Carolina Journal of International Law and Commercial Regulation*(20), 41-96.

Lysen, G. (1985). Three Question on the Non Contractual Liability of the EEC. *Legal Issues of European integration*(2), 166.

Macklem, P. (1997). Aboriginal Rights and State Obligations. *Alberta Law Review, 35*, 100.

Marinberg, D. (2001). GATT/WTO Waivers: "Exceptional Circumstances" as Applied to the Lomé Waiver. *Boston University International Journal*(19), 153.

Maltz, E. M. (1985). The Concept of Equal Protection of the Laws – A Historical Inquiry. *San Diego Law Review*(22), 499.

Mayer, C. J. (1990). Personalizing the Impersonal: Corporation and the Bill of Rights. *Hasting Law Journal*, 557-667.

McDaniel, P. R. (2004). The David R. Tillinghast Lecture Trade Agreements and Income Taxation: Interactions, Conflicts, and Resolutions. *Trade Law Review, 57*, 279.

Mercurio, B. (2009). Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding. *World Trade Review, 8*(2), 315-338.

Metzer, D. J. (2006). Member State Liability in Europe and the United States. *International Journal of Constitutional Law, 4*(1), 39-83.

Morrison, F. L. (1998). The Liability of Governments for Legislative Acts in the United States of America, Supplement to American Law at the End of the 20th Century: U.S. National Reports to the XVth International Congress of Comparative Law, Section IV, Topic IV.D.1. *American Journal of Comparative Law, 46*, 351-549.

Murphy, S. D. (2000). Contemporary Practice of the United States Relating to International Economic Law, US position of Foreign Sales Corporation. *American Journal of International Law, 94*, 533.

Nassimpian, D., (2007), '... And We Keep On Meeting: (De) Fragmenting State Liability', *European Law Review, 32, 821.*

North, D., & Weingast, B. (1989). Constitution and Commitment: the Evolution of Institution Governing Public Choice in Seventeenth Century England. *Journal of Economic History*(4), 803.

'Opinion General Advocate Trabucchi in Case 4/73, J. NoldKohlen- und Baustoffgrosshandlung v Commission of the European Communities, (1974)', in *Common Market Law Review*, 2, 348 – 350.

Organek, R. (2008). Congressional Response To WTO Sanction: Turning Lemons into Lemonade in The American Jobs Creation Act of 2004. *University of Miami International and Comparative Law Review, 16*, 150.

Parkinson, K. (1989). Admissibility of Direct Action by Natural or Legal Person in the European Court of Justice: Judicial Distinctions between Decision and Regulations'. *Texas International Law Journal*(24), 433.

Petersman, E.-U. (1983). Application of GATT by the Court of Justice of the European Communities. *Common Market Law Review, 20*(3), 426.

Petersmann, E.-U. (1998). How to constitutionalize International Law and Foreign Policy for the Benefit of Civil Society? *Michigan Journal of International Law, 20*(1), 1-30.

Pruzin, D. (2000). WTO Appellate Body under Fire for Move to Accept Amicus Curiae Briefs from NGOs. *International Trade Reporter*, 1805.

Puckett, A. L., & Reynolds, W. L. (1996). Sanctions and Enforcement Under Section 301: At Odds with the WTO? *American Journal of International Law*(90), 675.

Reed, P. (2006). Relationship of WTO Obligations to U.S. International Trade Law: Internationalist Vision Meets Domestic Reality. *Georgetown Journal of International Law, 38*(1), 209-211.

Schaefer, M. (1997). Are Private Remedies in Domestic Courts Essential for International Trade Agreements to Perform Constitutional Functions with Respect to Sub-Federal Governments? *Northwestern Journal of International Law & Business, 17*(1), 609-652.

Scheleyer, G. T. (1997). Power to the People: Allowing Private Parties to Raise Claims Before the WTO Dispute Resolution System. *Fordham Law Review, 65*(5), 2275-2311.

Schneider, A. K. (1998). Democracy and Dispute Resolution: Individual Rights in International Trade Organization. *University of Pennsylvania Journal of International Economic Law*, 537-638.

Schneider, A. K. (2001). Unfriendly Actions: The Amicus Curiae Brief Battle in the WTO', in Institutional Concerns of an Expanded Trade Regime: Where Should Global Social and Regulatory Policy Be Made? *Widener Law Symposium*(7), 101-107.

Shell, G. R. (1995). Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization. *DUKE Law Journal, 44*, 830-925.

Siegel, J. R. (2003). Waivers of State Sovereign Immunity and the Ideology of the Eleventh Amendment. *Duke Law Journal, 52*, 1187-1205.

Smith, A. D. (1996). Executive-Branch Rulemaking and Dispute Settlement in the World Trade Organization: A Proposal to Increase Public Participation. *Michigan Law Review, 94*(5), 1267.

Sprance, W. R. (1998). The World Trade Organization and United States Sovereignty: The Political and Procedural Realities of the System. *American University International Law Review, 13*(5), 1225-1265.

Steiner, J. (1993). From Direct Effects to Francovich: Shifting Means of Enforcement of Community Law. *European Law Review, 18*(1), 3-22.

Steinberg, R. (2002). in the Shadow of Law or Power?: Consensus-Based Bargaining and Outcomes in the GATT/WTO. *International Organization*(56), 339-374.

Sunstein, C. R. (2005). Why Does the American Constitution Lack Social and Economic Guarantees? *Syracuse Law Review, 56*(1), 1-17.

Sykes, A. O. (2004). the Persistent Puzzle of Safeguards: Lessons from the Steel Dispute. *Journal of International Economic Law, 7*(1), 523-564.

Tarullo, D. (2002). The Hidden Costs of Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions. *Law and Policy in International Business, 34*(1), 109-180.

Timmermans, C. (1999). the EU and Public International Law. *European Foreign Affairs Review, 4*(2), 181.

Trachman, J. P. (1999). The Domain of WTO Dispute Resolution. *Harvard International Law*, 27.

Trachtman, J. P. (1996). the International Economic Law Revolution. *University of Philadelphia Journal of International Economic Law, 17*(3), 5.

Trachtman, J. P. (1999). Bananas, Direct Effect and Compliance. *European Journal of International Law*, 664.

Tsymbrivska, O. (2010). WTO DSB Decisions in the EC Legal Order: Approach of the Community Courts. *Legal Issues of Economic Integration*, 185-202.

Uksagis, E. B. and Van Boom, W. H, (2013), Strict Liability in Contemporary European Codification: Torn Between Objects, Activities, and Their Risks.*Georgetown Journal of International Law*, Vol. 44, 610.

Van den Bossche, P. (2008). NGO Involvement in the WTO: A Comparative Perspective, at Mini-Symposium on Transparency in the WTO'. *Journal of Economic International Law, 11*(4), 717-749.

Van Geven, W. (1994). Non Contractual Liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a View to a Common Law for Europe. *Maastricht Journal of European and Comparative Law*(6), 6-40.

Van Hof, C. A. (2002). Avoiding A Nuclear Trade War: Strategies for Retaining Taw Incentives for U.S. Corporation in a Post-FSC World. *Vanderbilt Journal of Transnational Law, 35*(4), 1383.

Vazquez, C. M., & Jackson, J. H. (2002). Symposium Issue on WTO Settlement Compliance: Some Reflections on Compliance with WTO Dispute Settlement Decisions. *Law & Policy International Business*(33), 555.

Von Bogdandy, A. (2005). Legal Effect of World Trade Organization Decision within European Union Law: A Contribution to the Theory of the Legal Acts of International Organizations and the Action for Damages under Article 288 (2) EC. *Jorunal of World Trade, 39*(1), 45-66.

Von Bogdandy, A. (2008). Pluralism, Direct Effect, and the Ultimate Say: On the Relationship between International and Domestic Constitutional Law. *International Journal of Constitutional Law (I-CON), 6*(3 & 4), 397-413.

Wang, S. (1996). US Trade Laws concerning Nonmarket Economics Revisited for Fairness and Consistency. *Emory International Law Review, 10*(2), 593-616.

Weinrib, E. J. (1987). 'Causation and Wrongdoing', in Symposium on Causation in the Law of Torts. *Chicago-Kent Law Review, 63*, 407-450.

Wilber, C. K. (2003). Ethics and Economics Actors. *Post-Autistic-Economic Review, 3*(21), 13.

Williams, M. F. (2001). Charming Betsy, Chevron, and the World Trade Organization: Thoughts on the Interpretive Effect of International Trade Law. *Law and Policy International Business Journal, 32*(4), 677 - 697.

Young, M. K. (1995). Dispute Resolution in the Uruguay Round: Lawyers Triumph over Diplomats. *Journal of International Law*, 389-402.

Yu, M. (2007, December 31). Measuring the Impact of Trade Protection on Industrial Production Size. *Research Paper presented at the AEA Annual Meeting* . Chicago: the American Economic Association.

Zamora, S. (1996). Introduction: International Economic Law. *University of Pennsylvania Journal of International Economic Law*, 63-67.

Zdouc, W. (February 1999). WTO Settlement Practice Relating to the GATS. *Journal of International Economic Law, 2*(1), 295.

Zhengling, L. (2004). An Analysis of the Role of NGO's in the WTO. *Chinese Journal of International Law, 3*(2), 485-498.

Zonnekeyn, G. A. (2010). The ECJ's Petrotub Judgment: Towards a Revival of the 'Nakajima Doctrine. *European Journal of International Law, 30*(3), 256.

C. MAGAZINE

Andres, E. L. (1999, March 15). Bewildered Europeans Deplore 100% U.S. Tariff. *the New York Times*. New York: Arthur Ochs Sulzberger, Jr.

Chandler, C. (1995, June 26). Dream Team" Helps Kodak Make Its Case; Trade Lawyers Uncover Crucial Industry Newsletters. *Washington Post*. Washington: Khatarine Weymouth.

Heebner, J. (2005, January 5). Change A foot for U.S. Jewelry Manufactures. Washington DC. Opgehaald van http://www.jckonline.com/

D. WEBSITE

www.wto.org/dispute settlement.

www.eurofound.europa.eu

www.fao.org

www.dfait.go.ca

www. laws.findlaw.com

www.eurlex.europa.eu

www.unhchr.ch

www.wto.org/english

www.ssina.com

www.wsws.org

www.gpo.gov

www.thomas.loc.gov

www.eurlex.europa.eu

www.europarl.europa.eu

www.servat.unibe.ch

www.un-documents.net

www.senado.gov.ar

www.worldcourts.com

www.iuscomp.org